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Contests: For the Independence of t

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CONTESTS:

**For the Independence of the Federal
Judiciary under Article
Three, Section One**

OF THE

Constitution of the United States

MADE BY

WALTER EVANS
United States District Judge.

**First as to Official Tenure and Compulsory
Retirement of the Judges.**

Next as to Diminution of their Compensation.

1916—1920
LOUISVILLE, KENTUCKY

¹⁴
E92i



The Author

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STATEMENT.

The FIRST of THE CONTESTS referred to in this volume was made necessary in December, 1916, when the Senate in the 64th Congress passed an act entitled "An Act to Amend Section 260 of the Act to Codify, Revise and Amend the Laws Relating to the Judiciary." The proposed amendment provided for the enforced retirement of all Circuit and District Judges who, having served 10 years, had passed the age of 70 years.

This situation had induced the writer to send a communication to the Judiciary Committee of the Senate protesting against such action as unconstitutional and wrong upon grounds set forth therein.

Thereafter on the motion of the Honorable George Sutherland, a Senator from the State of Utah, the communication was published as Senate Document No. 688, 64th Congress, 2nd Session. This was done in time to have it laid upon the desks of all members of the House of Representatives before debate there. During that debate the document was read and inserted in full in the speech of Hon. John W. Langley, of Kentucky. There was considerable debate on the bill in the House, where it was defeated by a vote of 200 nays to 192 yeas on the 2nd day of March, 1917.

Under the somewhat confident expectation of a different result a score or more persons were widely reported to have been selected by the President (Mr. Wilson) to supersede that many of the older judges,

all of which would have been in disregard of Section 3, Article 1 of the Constitution of the United States.

The SECOND of THE CONTESTS referred to resulted when, in the "Act to provide revenue and for other purposes," approved by President Wilson on February 24th, 1919 (40 Stats., 1062), there was included a clause which, so far as now applicable, was in this language, viz.:

"for the purposes of that title *gross income includes* gains, profits, and income derived from *salaries*, wages and compensation for personal services (*including in the case of the President of the United States, the judges of the supreme and inferior courts of the United States * * * the compensation received as such*) of whatever kind and in whatever form paid * * * and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer," etc.

It was to test the Constitutional validity of that clause that the writer, the United States District Judge for the Western District of Kentucky, on September 19, 1919, brought in the United States District Court at Louisville, Ky., his action against J. Rogers Gore, then the Deputy and Acting Collector of Internal Revenue, to recover income taxes thus imposed and previously paid under protest.

Later, when the time approached for the hearing in court, the counsel whose names appear on the brief for the plaintiff, most kindly offered their aid, and at the hearing in the District Court before Dis-

trict Judge J. W. Peck, of Cincinnati, Ohio, it was argued for the plaintiff by Howard B. Lee and Edmund F. Trabue. The decision then being against the plaintiff, an appeal was taken by him to the Supreme Court of the United States, where it was argued on his behalf by William Marshall Bullitt and Edmund F. Trabue, the plaintiff, in the meantime, having, in addition to his judicial labors, prepared the pleadings and the briefs filed in his behalf. In the latter he stated his reasons for suing to be that the legislation was an

“insidious encroachment upon constitutional rights which might be made the beginning of an attack upon the independence of the judicial department of the government. Such stealthy encroachments (*Debbs case*, 158 U. S. 594) ought to be resisted, and upon the grounds hereinabove indicated that resistance should meet the approval of all thoughtful citizens, an unusual number of whom have recently taken the oath to support and defend that Constitution, one provision of which has been disregarded in the respect we have pointed out. Many of our citizens, indeed, at one time or another, have offered life itself in that behalf, and it can hardly be doubted that resistance to such encroachment is as patriotic as is sensitive acquiescence. While acquiescence on some occasions might be harmless, in others it might leave an opening for great evils. The resister in this instance is not actuated by any sordid expectation of pecuniary advantage, as at his age of 77 he will probably be the loser in any event as expense accounts may show, but he will have vindicated his sense of devotion early acquired and firmly cherished to

that CONSTITUTION he has long most unfeignedly revered and to maintain which in his early life he made the solemn vow to support and defend it."

Otherwise the history of the two contests appears in sufficient detail in the papers grouped in the following pages:

They consist

1st, of the Senate Document No. 688.

2nd, The Record in the case v. Gore.

3rd, The Briefs filed in the Supreme Court.

4th, The Opinion of the Supreme Court reversing the District Court, delivered June 1st, 1920, and reported in 253 U. S. 245, and

5th, The somewhat prematurely printed Brief for the plaintiff filed in the District Court for the hearing there.

The result of all this has been that all taxation imposed by the Revenue Act of 1919 on the compensation of the President and Federal Judges was removed and much, if not all, of the taxes collected thereon were refunded.

During the long time of the writer's work very helpful encouragement was given by Judges Thomas C. Munger, Edmund Waddill, Jr., Walter H. Sanborn, William C. Hook (now lamentably dead) Henry D. Clayton, Arthur L. Brown and George M. Bourquin, though all offers of pecuniary assistance were gratefully declined.

WALTER EVANS.

Louisville, Ky.,
1921.

NOTE.

Since the foregoing statement was prepared Congress has passed, and on November 23, 1921, the President approved the "Revenue Act of 1921."

At the instance of the Senate there was embraced in Section 213 of that Act a provision precisely similar to that found in the Revenue Act approved February 24th, 1919, and which provision, in the case referred to in the foregoing statement, the Supreme Court of the United States (253 U. S. 245) expressly held to be altogether unconstitutional and void so far as it embraced the President and Judges then in office. The purpose of Congress in again enacting this clause without the qualifications demanded by Section One of Article Three of the Constitution is not stated in the Act nor otherwise made apparent. To say that the last enactment was made in any unfriendly spirit would not, therefore, be admissible, but we may note a previous occasion when the action of Congress was in marked contrast to that here.

In 1908, in the case of *American Loan and Trust Co. v. Grand Rapids Co.*, 159 Fed. 775, the writer, then sitting in the District Court of the United States for the Western District of Kentucky, held that Congressional legislation which undertook to control funds in court in cases between private litigants was violative of the Constitution—a proposition obviously accurate. Instead of re-enacting the statute called

in question by the District Court Congress passed and the President approved the Act of March 3, 1911, amending Section 996, Revised Statutes (36 Stats. at Large, 1083), which wisely met the situation by making the Treasury Department in effect the banker of the Courts for such funds and permitting them to be deposited in the Treasury subject to the orders of the District Courts.

Compulsory Retirement of Circuit and District Judges

MEMORANDUM

IN OPPOSITION

TO THE PASSAGE OF THE BILL (S. 706) TO AMEND SECTION
TWO HUNDRED AND SIXTY OF AN ACT ENTITLED "AN ACT
TO CODIFY, REVISE, AND AMEND THE LAWS RELATING TO
THE JUDICIARY," APPROVED MARCH 3, 1911, WHICH
RELATES TO THE COMPULSORY RETIREMENT
OF FEDERAL JUDGES OF THE
UNITED STATES

BY

WALTER EVANS

JUDGE FOR THE WESTERN DISTRICT, KENTUCKY



ON MOTION BY MR. SUTHERLAND.

IN THE SENATE OF THE UNITED STATES,
January 25, 1917.

Ordered, That the manuscript of the memorandum in opposition to the passage of the bill (S. 706) to amend section 260 of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, which relates to the compulsory retirement of Federal judges of the United States, by Walter Evans, judge for the western district, Kentucky, be printed as a document.

Attest:

JAMES M. BAKER, Secretary.

COMPULSORY RETIREMENT OF FEDERAL JUDGES.

Article III, section 1, of the Constitution of the United States is in this language:

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.

Article I, section 3, provides that—

The Senate shall have the sole power to try impeachments * * * and no person shall be convicted without the concurrence of two-thirds of the Members present.

Article II, section 4, provides that—

The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for, and on conviction of, treason, bribery, or other high crimes and misdemeanors.

If these provisions mean anything it is that every judge of a court of the United States holds his office during good behavior and until, upon articles of impeachment duly presented, he has been convicted of treason, bribery or other high crime and misdemeanor, by a vote of two-thirds of the Senators present at the trial. And those constitutional provisions are of vital importance to the maintenance of that certainty of tenure, that independence of other departments of the Government, that exemption from the control of the passions and prejudices of the hour, and that freedom from the hunger and greed of official patronage which the farseeing framers of the Constitution thought were indispensable to the courageous discharge at all times of the great duties devolved upon them. It would be childish to contend that a judge, perfectly capable of performing all his duties efficiently, had committed treason or had been guilty of bribery or other crime or misdemeanor by having had the good fortune to reach the age of 70 years. That age as a test is, of course, purely arbitrary, and if the exigency of party greed or the demands of patronage or resentment at some judge who had offended some very influential member of one or the other House of Congress by ruling against him or his friend, should make it desirable, then the test of 60 years might be established, or 50. Or, indeed, any other test might be selected by Congress, for it is axiomatic that if the power exist there is usually no limit upon its exercise. The result might be that parties, as they succeed each other in governmental control, by one arbitrary test or another might crowd out the judges as they pleased, and thus utterly subvert all the constitutional restrictions to which we have referred. That this is no imaginary suggestion is shown by the legislation now to be considered, and which has characteristics that have led some of the newspaper press to call it a "ripper bill"—a sort of bill not heretofore attempted upon the judiciary, and which, indeed, has features worse than the "recall."

Disregarding the constitutional provisions referred to, Congress is about to enact and the President may approve "An act to amend

section two hundred and sixty of an act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March third, nineteen hundred and eleven,' " wherein, after reenacting previous provisions of law to the effect that when a judge reached the age of 70 years and had served as such for 10 years or more in succession he might, if he so chose, resign his office, and thereafter continue during his life to receive his salary in full, the act, among other things, provides as follows:

In the event any such judge of a district court of the United States, having so held a commission or commissions at least ten years continuously, and having attained the age of seventy years as aforesaid, shall nevertheless remain in office, the President, if in his opinion the public good so requires, may appoint, by and with the advice and consent of the Senate, an additional judge of such court, who, notwithstanding the incumbency of the judge so entitled to resign, shall preside customarily over the said district court, and shall exercise such powers as are vested by law in the judge thereof. And the district judge so entitled to resign shall thenceforth be relieved, save as hereinafter provided, from service therein: *Provided*, That the said district judge so entitled to resign as aforesaid may be designated and appointed from time to time to hold any district court, either in his district or within or without his circuit, as provided by sections thirteen, fourteen, fifteen, sixteen, and seventeen of this title, or to sit in the circuit court of appeals of his circuit, as provided by section one hundred and twenty of this title.

Upon the death or resignation of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as herein provided, the vacancy caused by such death or resignation of the said judge so entitled to resign shall not be filled, but the number of judges then in office shall be reduced accordingly.

The question (and it is one of great importance) is, whether the foregoing provisions of the act are, in whole or in part, violative of the Constitution of the United States?

Before discussing the direct question it may be well to make two preliminary statements.

First. Many times in the past Congress has very properly made physical and mental disability of a permanent character and not mere age the basis for creating new judgeships. The facts in each of such cases were first fully and fairly ascertained, and while this plan afforded no opportunity for wholesale or arbitrary not to say unconstitutional removals of judges, it did, in each instance, wisely meet a public exigency in a just and decorous manner.

And, indeed, though Congress may not rightfully delegate it to the President, it has full power itself to create new district judgeships in any judicial district in the country as often as it sees fit. This, when the business of the district required it, has often been done, and if that only had been done here, nothing could have been said against its power to do so. In that contingency the old judge and the new would have been able to proceed under the provisions of section 23 of the Judicial Code, which is as follows:

In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district.

Judges are not ordinarily likely to fail to be so fair and dignified in their conduct as to call for the interposition of the senior circuit judge, but if, for any reason, they do not agree, the way is open to a proper settlement of any differences.

Second. It is correct to say that every judge of a district court of the United States who is authorized to retire under the law should

do so whenever he reaches the point where he is mentally and physically incapacitated for the efficient discharge of his duties. He owes this to himself, to the bench, to the bar, and to the community in which he lives and where his functions are to be exercised. But if he is abundantly able to perform his duties, he is under no obligation whatever to surrender the work he may love and the high position he occupies to the mere demand of those who may hunger for his office, and especially if the very proper and decent arrangement provided by section 23 of the Judicial Code is to be wiped out. If incapacitated he should retire, but otherwise he is entirely within his rights in continuing in office and discharging his duties.

FIRST OBJECTION.

Returning to the act, we find that, in substance and effect, it provides, not that new and additional judgeships shall thereby be created and established, but that in certain contingencies the President may himself create such new and additional judgeships, if in his opinion the public good requires it, by the appointment of new and additional judges, and that in the years to come he may do this, one by one, in every judicial district. One would suppose that there could be no doubt that such new judgeships would be new offices, created and beginning to exist in many instances not when the act was passed by Congress and became effective by the President's approval, but years thereafter when, in the opinion of the President, a new judgeship should be created by him under the authority of the act. These offices, it is true, would have the same name as others previously existing but nevertheless they would be new and additional offices not previously in existence, and their creation would involve new and additional expenditures of public money, and the conferring upon other and additional persons of power to exercise judicial functions. An office not previously existing would, from time to time, and possibly in the remote future, be created by mere executive fiat. Argument could hardly make plainer than does its mere statement, that authorization to create the new offices is the delegation of legislative power to the Executive, because the power to create new offices is essentially and inherently legislative. The Congress exercises its legislative power under Article 1 of the Constitution in creating new judicial offices, and under Article 2 appointments thereto must be made by the President. If the legislation in this instance be not complete, Congress can not delegate to the President the power to complete it by his own act, and the attempt to do so was an ineffectual effort to delegate its legislative power.

It may illustrate the proposition that section 1 of the Judicial Code (as did previous judiciary acts beginning with that of 1789) provides, in substance, that "in each of the districts described * * * there shall be a court called a district court, for which there shall be appointed one judge to be called a district judge except" that in a few clearly specified instances one or more additional judges shall be appointed for the district. Thus, Congress created the courts and the judgeships (1 Stats., 74). This work was legislative in character, and strictly within the powers of the legislative branch of the Government. The appointment of all these judges—the filling by appointment of all these offices—was executive

in character and fell strictly and properly within the constitutional functions of the President. Could Congress any more take from the President and arrogate unto itself the power of appointing the new judges than it can, under the Constitution, divest itself of the power of legislating for the amendment of section 1 of the Judicial Code or kindred enactments by conferring that legislative power upon the President to be exercised when in his opinion the public good may demand it? Surely this question must be answered in the negative until there shall be expunged from the Constitution, first, that part of its first and most prominent article and from its first section the words: "All legislative powers herein granted shall be vested in a Congress which shall consist of a Senate and House of Representatives"; second, that part of Article II, section 1, opening with these words, "The executive power shall be vested in a President of the United States of America"; third, that part of Article II, section 2, which provides that the President "shall have power to nominate and by the advice and consent of the Senate * * * appoint the judges of the Supreme Court and other officers provided for by law," and fourth, those parts of Article III, section 1, which, as we have seen, begin, "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

That the three departments of the Government—legislative, executive, and judicial—are, and were intended to be, with certain definitely specified exceptions, separate and, within their respective spheres, independent, could not be made clearer than they are by the first three articles of the Constitution.

Certainly it may be regarded as settled that only the Congress can legislate for the Nation. If the power to create judgeships is legislative in character, then it is not executive, and until after the legislative department has finished its work the functions of the executive do not attach. When a judgeship has been effectively created by legislation, it is within the exclusive power of the President to fill the office thus created by law; but by the act under consideration the legislative power is delegated to the President, to be exercised by him after he has concluded that the public good requires him to create certain new judgeships, and after he has created them in the interest of the public the act authorizes him to fill them. Surely, in doing this he first exercises a legislative power attempted to be delegated to him by the act, and having in the exercise of that power created certain new judgeships, he exerts the executive power of appointing persons to fill the offices he has thus created.

It does not seem that clear thinking can leave the situation open to any other conclusion than that the parts of the act above copied are unconstitutional, because Congress did not itself legislate and create the new judgeships, but left that work to the Executive.

And it may be said that apart from what has been pointed out, Article II, section 2, clause 2, authorizes the President, with the advice and consent of the Senate, to appoint all officers whose appointment is not otherwise provided for in the Constitution and is provided for by law, though Congress may by law "vest the appointment of such inferior officers as may be deemed proper in the President alone, or in the courts of law or in the heads of departments." No doubt it is true that under this clause Congress in various enact-

ments has authorized either the President or the heads of departments from time to time "in their discretion" to appoint persons to various offices or temporary positions. In all such cases as well as in many others it is settled that the power to appoint implies the power to remove (*Blake v. United States*, 103 U. S., 231), inasmuch as there is, as to them, no constitutional provision that they shall hold during good behavior. But no instance is recalled where the validity of legislation giving such discretion has been subjected to the test of judicial decision. Logically, therefore, there can not be drawn from the mere enactment of such laws and acquiescence therein, any conclusion unfavorable to the views expressed respecting the act now under discussion, the validity of which is drawn in question, and it must stand or fall as may be determined by the courts, regardless of mere general acquiescence in other and very different legislative acts.

SECOND OBJECTION.

Recalling the constitutional provision that the judges of the courts of the United States shall hold their offices "during good behavior," and that their removal shall only be effected by the sentence of the Senate sitting as a court of impeachment, after a trial and conviction for treason, bribery, or other high crime or misdemeanor by a two-third vote of the Senators present, we find that the act provides, first, that the new judge shall preside customarily over the district court; second, that he (the new judge) shall exercise such powers as are vested by law in the judge of that court; third, that "the district judge so entitled to resign shall thenceforth be relieved * * * from service therein," save, fourth, that the district judge so entitled to resign may be designated and appointed from time to time to hold any district court, either in his district or within or without his circuit, or to sit in the circuit court of appeals. These and especially the latter are important duties for a judge whose "relief" from his own office the President alone will have decided will be for the public good.

Thus it is certain that before the appointment of the new judge the proscribed judge was at least upon an equal footing with his junior, but thereafter he can not hold court nor sit in his own district without being designated for that duty by somebody who, intentionally, is not named. True sections 13, 14, 15, 16, and 17 of the Judicial Code are mentioned in the act, but a reading of them makes it clear that neither of them applies to the designation of a judge to sit in his own district. His commission fully authorizes that without further designation by anybody, but the attempt is to nullify that evidence of title. Relief from work in his own district—the only one his commission covers—is, therefore, a substantial deprivation of the right to hold "during good behavior" the office to which that commission applies. And as the senior circuit judge is not required to designate the "relieved" judge for any work, and as the Act prevents his sitting unless so designated, the deprivation of his right to hold his office during good behavior may, under the guise of "relief" from its duties in his own district or elsewhere, be complete. In short, the result of it all is to permit the President to abolish one district judgeship and create another in its stead whenever a judge reaches 70 years and does not resign. The question of "good be-

havior" is not permitted to have the least bit of that potent influence the Constitution tried to give it. It emphasizes this view that the old judgeship is not to be refilled. Only the new one is to be continued.

The Constitution not only provides (a) that "the judges shall hold their offices during good behavior," and (b) "shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office," but also (c) that they can "be removed from office" by impeachment and conviction of crime.

It is obvious that the act and its operation can not, per se be considered as the constitutional equivalent of impeachment, conviction, and removal from office of those judges who have reached 70 years of age. Nor does the act in terms, "diminish their compensation." What a future Congress may do in the way of diminishing the compensation, if it should be sufficiently actuated by a further proscriptive passion or individual feeling against some judge who, by "resigning" after 70, had ceased "his continuance in office," need not be considered, though some judges have imagined that if they "resigned" their offices and thereby ceased to "continue" therein it would be quite as easy to enact a law to diminish or altogether cut off compensation as it would be to pass the act under consideration. Those who thought the Constitution secured them against this act can not feel secure against another act which might altogether repeal section 260 of the Judicial Code, which the act under consideration has amended. True, the public faith, at least impliedly, is pledged to the judges who resign under the implied promise of that section, and this might be an obstacle to its repeal, but the implied pledge of public faith is not a greater security than are the sanctions of that Constitution which all swear to support. If we may quibble with one, we may quibble with the other.

But these matters apart, it is important to inquire what is the meaning of the words "shall hold their offices during good behavior," as used in the Constitution? Of course, if impeached and convicted, a judge may be removed from his office by the judgment of the Senate sitting as a court of impeachment, but that, at least in form, is not what has been done. Here there would be a substantial removal in fact though not in form inasmuch as the judges are attempted to be effectively deprived of the right to hold their offices during good behavior by a process which altogether ignores the question of the behavior of a judge and arbitrarily deprives him of the power and opportunity of holding his office or exercising its functions in his own district or elsewhere, except at the voluntary behest of some other man.

While artfully constructed to effect an object which it is attempted to conceal, no disguise can fully hide the fact that the destruction of the right of the district judges to hold their offices during good behavior is to be accomplished by the act. If he does not resign, he is to be effectively "removed" from the bench in his own district, for that is what was intended to be and must necessarily be the result not only from the requirement that the new judge shall "preside customarily" but especially from the provision that the senior judge "shall thereafter be relieved from service," and the exceptions in no substantial way alter either the intention of Congress or the operation of the act. The judge may have continued to be perfectly adequate

to the discharge of his duties. Years of service may have demonstrated this, and yet, under the guise of relieving him without his consent, he is, in effect, to be deprived by the President alone of the right to hold his office during good behavior—all without impeachment or trial—if in the opinion of the President “the public good so requires.” Under the Constitution the only way to ascertain whether a judge has done some act which is not “good behavior” within the proper and constitutional sense is by impeachment and conviction of treason, bribery, or other high crime or misdemeanor, that being expressly prescribed as the exclusive test. By the act, however, the constitutional method, the method which gives the judge a fair and full hearing, is set aside and another is substituted by which the President, without notice or hearing, may impeach him, may secretly hear a faithful partisan’s testimony, and may therefrom be convinced that the “public good” will be promoted. These proceedings will be behind closed doors. None but the patronage seeker may be heard. Certainly there will be no real impeachment, nor a trial or conviction by the Senate nor any sentence by a two-thirds vote of the Senators. Before this the incumbent was a real judge. Afterwards he is but a shadow. In short, he is “recalled” or “retired,” not on his volition but by the President upon his own motion. This result can only come from something which the Constitution forbids. No fair consideration can efface the result that something had been done by which the judge had been deprived of his rights in a manner that plainly violates the organic law.

In other words, the “relieved” district judge can not sit even in his own district, however able, ready, and willing he may be to do so, without the consent of some other judge, which consent the latter may, if he chooses, entirely withhold, thus making the “removal” complete in fact, though the bill cunningly contrives that it shall not be so in name.

Because of increase of business from time to time acts have been passed by Congress for the creation of additional judgeships in given districts, and to this there can be no constitutional objection; but the judges who came in under those laws were simply district judges, having no superiority or precedence over their colleagues on the same bench. That course comported with the importance and dignity of the judicial office, and there were no differences which section 23 of the Judicial Code could not control. But the act now under consideration was intended to remove an incumbent who, after he reached the age of 70, should be guilty of the bad behavior of keeping some one else out of a coveted district judgeship. And the act is not designed merely to meet the present, but it reaches into the future and will hereafter apply to every district judge throughout the country. The importance of the act, therefore, is not to be measured by its effect upon the few who are now attacked. It will hereafter, in succession, reach and operate upon all.

Thus a new judicial system based upon the President’s opinion of what will be promotive of the public good will arise to supersede that of the Constitution, for under the last clause of that portion of the act copied above the old judgeships will lapse as the proscribed seniors die or resign. Thereafter only the new judgeships will exist.

In *United States v. Hartwell* (6 Wallace, 393) the Supreme Court, speaking through Mr. Justice Swayne, said: “An office is a public

station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." That one of those ideas which is of little importance in this investigation is that of "emolument," for that, at least at present, is not threatened. While the "duties" of a judge may be fairly changed, they can not be substantially taken away without materially interfering with the "tenure" and "duration" of the office, for if the duties are entirely taken away, nothing is left but a pension—salary which may continue, though the office is vacated. The right to hold the office itself—not a mere fag end of it—is obtained from the Constitution and the laws made in pursuance thereof. This covers the idea of "tenure." The "duration" of a judge's tenure of office is likewise derived from those sources, and they fix the duration of the tenure of his office by the expression "during good behavior," which was, as usual, construed to mean "during life" in *James v. United States* (202 U. S., 408). This being true, a judge's tenure "during good behavior" can not be broken except by the Senate when it finds him guilty of "treason, bribery, or other high crime and misdemeanor." Then he may be removed. His tenure will then properly be broken because he has not been of "good behavior." But this can not lawfully or fairly be done under the act, proceedings under which will or may be behind closed doors, in very marked contrast with a fair trial under the Constitution.

While the right of incumbency of an office is not "property" in the exact sense of that word, the whole constitutional machinery respecting Federal judgeships is a vain thing if it has no force or effect, or if it confers no vested rights upon the judge. Indubitably the Constitution intended to make the judicial office a very substantial thing, and that intention must control in this connection or the constitutional arrangement becomes a mere scrap of paper, so far as the tenure of the judicial office is concerned. The ultimate effect of deciding that, while the judges must uphold the Constitution as it affects the rights of every other citizen, a different rule must be applied to the judges themselves, might be curious if not disastrous.

It would seem from these considerations to be free from doubt that the second objection we have urged must also be sustained.

If the first objection we have urged is sustained, the entire act, so far as it affects the district judges, will be held invalid, and, possibly as to them, leave section 260 of the Judicial Code in full force. If, however, our first objection is not sustained but our second is, then the portions of the act which seek to remove the district judges who are eligible to retire, under the guise of giving them a "relief" they neither need nor desire, being separable from the others, will be eliminated by their unconstitutionality and will cease to be available for the purposes for which they were designed.

If the act is merely unwise and unjust, the courts will be powerless, but if it be a mere unconstitutional entering wedge for plausible in-fractions of the organic law whereby patronage contests may lead to the lessening of the courage and independence of the judiciary, it may be well in making a contest now to recall the long struggles of the Anglo-Saxon race to establish that independence of the judges which the Constitution guarantees but which the act is designed to weaken. If that independence is once weakened, it may not be easy to resist its ultimate overthrow.

Of course, what we have said refers altogether to those features of the act which affect the district judges and their rights. It is not our purpose in any way to deal with the circuit judges, who will themselves know how to meet the situation, so far as it is designed to affect them.

REMEDIES.

The constitutional guaranties being as we have stated them, it is not surprising that no specific remedies for their enforcement have ever been prescribed by statute. That specific remedies would be necessary was not thought of probably because an occasion for them was not conceivable.

In the opening sentences of the opinion in *Marbury v. Madison* (1 Cranch, 154), Chief Justice Marshall spoke of "the peculiar delicacy of the case, and the novelty of some of its circumstances." Later (p. 162) he said in respect to the appointment of a judicial officer that "the discretion of the Executive is to be exercised until the appointment is made. But having once made the appointment, his power over the office is terminated in all cases where, by law, the officer is not removable by him." This brought him to the inquiry whether the judicial officer there had a right and if so whether he had a remedy if that right had been violated. Upon this the Chief Justice said:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford him protection. * * * The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

In that case, however, the Supreme Court found itself unable to grant the specific relief sought because to issue a writ of mandamus—the sole relief there prayed for—would have been an exercise of "original jurisdiction," not warranted by the Constitution—the jurisdiction of the Supreme Court being appellate with a few exceptions which did not include the case then before it. Nor probably would the Supreme Court have "original jurisdiction" to hear cases growing out of the act now in question.

The district court, however, is not so hampered.

But in the meantime (judicial remedies apart) the provisions of the act, in direct and explicit terms, are aimed at seven district judges in various parts of the country. Their biographies might show that each of them, in peace or in war, had endeavored "to do the State some service." Each of them is in good health and each is now, as he has been for many years, industriously and faithfully performing the duties of his office. No one of them has seen fit to retreat under the threat held out by the act. Nor will any one of them acknowledge that his past services deserve the unprovoked humiliation the act seeks to put upon him.

Under such circumstances deliberate and impartial consideration of two suggestions might not be regretted: First, the course of nature may, ere long, open up the constitutional way to proceed without unduly taxing the patience of any, and second, as no one of the district judges at whom the provisions of the act are at present aimed in unmistakable language, would desire to serve after he had

become permanently incapacitated for the efficient discharge of his duties, a law could not be fairly objectionable which authorized the appointment of an additional district judge in any district where the Associate Justice of the Supreme Court allotted to the circuit in which such district judge resided and any one of the circuit judges therein, or in case any two of the circuit judges therein should ascertain and certify to the President that any district judge in such circuit had, from any cause, become permanently incapacitated to perform the duties of his office. In this way and in a spirit of judicial fairness the facts could always be perfectly and accurately ascertained in respect to each case. This course would seem also to better harmonize with the judicial system contemplated by the Constitution than does that proposed in the act.



TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No.

654

WALTER EVANS, Plaintiff-in-Error,

vs.

J. ROGERS GORE, Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY

FILED, DECEMBER , 1919.

()

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

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WALTER EVANS, Plaintiff-in-Error,

versus

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TRANSCRIPT OF RECORD

Proceedings of the District Court of the United States for the Western District of Kentucky, at a regular term begun and held at the Federal Court Hall in the City of Louisville, on December 23, 1919.

PRESENT: Hon. JOHN W. PECK, Judge of the District Court of the United States for the Southern District of Ohio, sitting pursuant to a designation and appointment by the Senior United States Circuit Judge for the Sixth Circuit in accordance with Sections 14, 17, 20 and 21 of the Judicial Code to hear and determine the hereinafter mentioned cause.

BE IT REMEMBERED that heretofore, towit: on September 11, 1919, came the plaintiff and filed in the Clerk's office of the said Court his petition, which is in words and figures as follows, towit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DIS-
TRICT OF KENTUCKY.

No. 557.

WALTER EVANS, - - - - - *Plaintiff,*
against

J. ROGERS GORE, Deputy and Acting Col-
lector of Internal Revenue for the
Fifth District of Kentucky, - - *Defendant.*

PETITION.

The plaintiff, Walter Evans, states that he is now and for many years has been a duly appointed and commissioned Judge of the United States District Court in Kentucky, towit, from March 6th, 1899, to July 1st, 1901, for the District of Kentucky, and from the latter date until the present time he has been and now is the United States District Judge for the Western District of Kentucky, as provided by the Act of Congress approved February 12th, 1901 (31 Stats. 781), entitled "*An Act to divide Kentucky into two judicial districts.*"

Being such United States District Judge for the Western District of Kentucky during the year 1918,

and up to and including the present time, plaintiff was required under the express provisions of Section 213, 210 and other sections of the Act of Congress of the United States entitled "*An Act to provide revenue and for other purposes,*" approved February 24th, 1919, to make to the defendant a return of his income for the year 1918, and expressly to include therein the amount of the lawful compensation paid to him as such United States District Judge for the Western District of Kentucky for and during the year 1918, viz., \$6,000.00, and to pay the income taxes thereon laid in said Act or be subject for a failure to do so to the pains and penalties prescribed in Section 253 thereof. He states that on the 12th day of March, 1919, he was required to do so, and for that sole reason, he did include in his individual income tax return for the year 1918 said \$6,000.00 paid to him by the United States as his compensation for that year as such United States District Judge. He says that then and there upon the face of said return and as part thereof he made his protest in writing against being required to make said return, and which protest was attached to said return when it was delivered to the defendant and was as follows, to wit:

"Under the compulsion of the express requirements of the Act of Congress approved February 24th, 1919, entitled 'An act to provide revenue, and for other purposes,' and only under such compulsion, do I include in the annexed return and as part there-

of the \$6,000.00 which was paid to me by the United States as my compensation and salary for the year 1918 as United States District Judge for the Western District of Kentucky, and I hereby comply with that requirement under protest, which protest is based upon the ground that to the extent that said Act imposes any taxation upon my said salary and compensation as such it is unconstitutional and void, inasmuch as it is thereby intended to and will diminish my said compensation as such Judge by a statute enacted and now sought to be enforced during my continuance in said office. This protest is intended to apply to this return as it affects both the normal taxation and the sur-taxation intended to be imposed upon my said salary. Walter Evans."

Being required by said Act to do so, notwithstanding said protest, and availing himself of the option given by Section 250a of the said Act approved February 24th, 1919, plaintiff, in one installment, paid to the defendant, J. Rogers Gore, who was then the lawful Deputy and Acting Collector of Internal Revenue for the Fifth Collection District of Kentucky, at Louisville, where the plaintiff resides, and in which district there was then a vacancy in the office of Collector, the sum of Two hundred and seventy-six and 47/100 (\$276.47) dollars, the whole amount of the income taxation expressly and in terms imposed by the said Act upon plaintiff's said compensation as such United States District Judge for the year 1918, but plaintiff avers that he made such payment of said sum of \$276.47 income

taxation imposed upon his compensation as such Judge by said Act approved February 24th, 1919, under a protest made in writing at the time of such payment and then delivered by him to the defendant in advance of such payment. Said protest so made was as follows:

“Louisville, Ky., March 12th, 1919.

J. Rogers Gore, Esq.,
Deputy and Acting Collector
of Internal Revenue,
Fifth District of Kentucky,
Louisville, Ky.

Dear Sir:

I herewith hand you my INDIVIDUAL INCOME TAX RETURN duly subscribed and sworn to for the calendar year 1918, under the requirements of the Act of Congress entitled ‘An Act to provide revenue, and for other purposes,’ approved February 24, 1919. As required by the provisions of that Act and only because of the requirement and under protest as stated on said return, I have included in said return the sum of Six thousand dollars (\$6,000), the amount paid to me by the United States during that year, the same being my lawful compensation and salary for the year 1918 as the United States District Judge for the Western District of Kentucky in which office I continued during the whole of that year. Said return, as you will see, includes said \$6,000 for both the normal income tax and the surtax. Upon said return the amount directly imposed upon my compensation as Judge for normal taxes was \$192.90, and the amount imposed for surtax was \$83.57, a total of \$276.47, all of which was imposed upon my said

salary, as without its inclusion in said return I would have no income tax of either sort to pay for 1918, inasmuch as normal taxation on certain dividends named in said return were 'paid at the source' at the rate of 8 per cent., and the said dividends were not sufficiently large to be subject to the surtaxation imposed by the Act.

For the latter sum of \$276.47 I herewith also hand you my certified check, payable to you or your order, on the National Bank of Kentucky of this city in payment of all the said taxes imposed upon my said salary for that year, but I make this payment under protest, and will sue you for the recovery of the full amount so paid, namely, \$276.47, with interest thereon at the rate of six per cent. per annum from this date until paid, for the reason and upon the ground that no part of said sum is lawfully and constitutionally due, but the whole of it is an unlawful exaction of taxes from me upon and in diminution of my compensation and salary as such United States District Judge for that year, my claim being that the said Act, approved February 24th, 1919, so far as it lays or authorizes the laying or exacting of any of said taxation on my compensation as such United States District Judge is in violation of Article 3, Section 1, of the Constitution of the United States, which forbids by such means or otherwise the diminishing of my compensation as such Judge during my continuance in said office.

Asking for your receipt in due form for the taxes so paid, I am,

Very respectfully,

Walter Evans."

Plaintiff states that thereafter, on March 18th, 1919, pursuant to the provisions of Section 1316a of the said Act approved February 24th, 1919, he made application to the Commissioner of Internal Revenue for the refunding to plaintiff of the said sum of \$276.47 income taxes so paid upon his said compensation as such Judge, said application being thus made on what is known as Form 46, the same having been prescribed and approved by the Commissioner of Internal Revenue and furnished to applicants by said Commissioner as the one proper for such applications, and plaintiff in proof of such payment sent to the Commissioner of Internal Revenue the affidavit of the defendant stating that the said payment of said \$276.47 had been made to him by plaintiff but under protest on March 12th, 1919. Plaintiff states that said application was received by said Commissioner at his office on the 22nd day of March, 1919, and the acknowledgement by said Commissioner of the receipt of said application was made to plaintiff by said Commissioner as of that date.

Plaintiff states that after consideration thereof the Commissioner of Internal Revenue on the 9th day of September, 1919, denied the said application and refused to refund all or any part of said \$276.47, the income taxes so exacted and paid as hereinbefore stated.

Plaintiff states that the taxation so imposed was expressly upon his compensation as such Judge, and which, as such, was collected from him and was a

diminishing of such compensation during his continuance in office as such District Judge to the extent of \$276.47 for the year 1918, and that the said taxation was imposed under a law providing for internal revenue, and this action is thereby brought within the jurisdiction of this court under the fifth clause or subsection of Section 24 of the Judicial Code, and plaintiff thereupon brings this action in this court against the said defendant, J. Rogers Gore, Deputy and Acting Collector of Internal Revenue as aforesaid, and avers as the basis and ground of his claim to recover said sum and interest thereon from the date of payment thereof to defendant, that those provisions of the Act entitled "*An act to provide revenue, and for other purposes,*" approved February 24th, 1919, and under and pursuant to which said income taxes were expressly laid upon his compensation as such and was paid by plaintiff upon his said compensation as such Judge for the year 1918, are unconstitutional and void, the exacted payment of said taxes being a diminution of his compensation as such Judge for the year 1918, and during his continuance in office in direct violation of Article 3, Section 1, of the Constitution of the United States, which reads as follows:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall, at stated times, receive for

their services a compensation which shall not be diminished during their continuance in office.”

Because of said provisions of the Constitution of the United States he avers that Congress had no constitutional power or right to enact the said provisions of the said Act so approved on February 24th, 1919, under which such taxation upon plaintiff's compensation was exacted by the United States, that said provisions of said Act were, therefore, wholly void and afforded no justification, right or authority to the defendant or to the United States through him to enforce the collection of the said income taxation upon said plaintiff's compensation as such United States District Judge, and that the collection of said income taxes upon said compensation was an unlawful act of the defendant, and furthermore was an altogether wrongful diminution of plaintiff's compensation as such Judge and in violation of his rights under the Constitution of the United States, which, as aforesaid, forbid by that or any other means the diminution of his compensation as such Judge during his continuance in office.

Plaintiff states that the collection by the defendant of said income taxation imposed as hereinbefore stated upon plaintiff's compensation as such judge was unlawful; that the act of the defendant in enforcing said collection from plaintiff was unlawful, and that the means of enforcing and compelling the said collection thereof were also unlawful to the in-

jury and damage of the plaintiff to the extent aforesaid.

By the defendant's unconstitutional and unlawful acts as hereinbefore fully set forth the plaintiff was injured and damaged by the defendant to the extent of \$276.47 and interest thereon from March 12th, 1919, until paid, and the full amount thereof the defendant then became bound to pay to plaintiff, and being so bound he undertook to pay the same but has wholly failed to do so to any extent whatever.

Wherefore the plaintiff prays for judgment against the defendant, J. Rogers Gore, for the sum of Two hundred and seventy-six and 47/100 (\$276.47) dollars with interest thereon at the rate of 6 per cent, per annum from the 12th day of March, 1919, until paid, and for his costs herein expended. Plaintiff also prays for all other proper relief.

WALTER EVANS,

Pro se.

Sworn to before me by Walter Evans this 11th day of September, 1919.

A. G. RONALD,

Clerk.

**IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DIS-
TRICT OF KENTUCKY.**

WALTER EVANS, - - - - - - *Plaintiff,*

vs.

DEMURRER.

J. ROGERS GORE, Deputy and Acting Col-
lector of Internal Revenue for the
District of Kentucky, - - - *Defendant,*

The defendant demurs to the petition herein be-
cause it does not state facts sufficient to constitute a
cause of action.

W. V. GREGORY,

U. S. Atty.,

Counsel for Defendant.

FINAL JUDGMENT.

At a Court held December 23, 1919:

The court being now sufficiently advised of the
questions arising on the demurrer of the defendant
to the plaintiff's petition, delivered its opinion there-
on in writing, which is filed and made a part of the
record herein.

Pursuant to said opinion it is considered and ad-
judged by the court that the said petition is not suf-
ficient in law and that the demurrer thereto should
be and it is sustained, to which the plaintiff by coun-
sel then excepted and still excepts.

The plaintiff by counsel declined to plead further, and it is thereupon considered and adjudged by the court that the plaintiff's petition should be and it is dismissed, and that the defendant, J. Rogers Gore, do have and recover of the plaintiff, Walter Evans, his costs herein expended, as the same shall be properly taxed by the Clerk, and said defendant in due course may have execution therefor. The plaintiff by Counsel excepted and still excepts to the judgment of the court dismissing his petition and awarding costs against him.

And thereupon the plaintiff and the defendant tendered a stipulation herein; and the plaintiff presented his petition praying for the allowance of a Writ of Error from the Supreme Court of the United States, together with his Assignment of Errors, and bond, and it appearing therefrom that the constitutionality of a law of the United States is drawn in question in this action, and on consideration thereof.

IT IS ORDERED that the stipulation, the petition for the Writ of Error, the Assignment of Errors and the bond be, and the same hereby are filed; that a Writ of Error be, and the same hereby is allowed to have reviewed in the Supreme Court of the United States, the judgment and proceedings heretofore had in this cause, and that the bond tendered be and the same is hereby approved.

December 23rd, 1919.

JOHN W. PECK,
*District Judge of the United
 States for the Southern Dis-
 trict of Ohio.*

The opinion, assignment of errors and stipulation referred to in the above judgment, are as follows, to-wit:

OPINION.

Peck, District Judge for the Southern District of Ohio, sitting by designation in the Western District of Kentucky, for the purposes of the above-entitled cause.

Heard upon demurrer to the petition.

From the petition demurred to the following facts appear: The plaintiff is, and was before the passage of the Income Tax Law of 1919, a judge of a District Court of the United States. In March, 1919, as required by the terms of that Act, he made his income tax return, including therein, under protest, his judicial salary for the preceding year. He thereafter paid the deputy collector his income tax thereon, under protest, with notice of his intention to sue to recover it. He subsequently made the necessary application and appeal to the Commissioner of Internal Revenue for refunder thereof, which were overruled and refused, and accordingly he now sues the deputy collector for the return of the tax.

No question is made as to the regularity of the steps taken preliminary to bringing the suit, and the case turns wholly on the merits.

The sole question is whether Section 213 of the Act of February 24, 1919 (40 Stats. 1065), insofar

as it requires the compensation received by judges of the Supreme and inferior courts of the United States to be included within the gross income returned, is contrary to Article 3, Section 1, of the Constitution of the United States. That section is as follows:

“The ~~judicial~~ power of the United States, shall be vested in ~~one~~ Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office.”

The definition contained in Section 213 of the Act states that the term “gross income”

“Includes, gains, profits and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or District of Columbia, the compensation received as such), of whatever kind in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains

or profits and income derived from any source whatever."

The gross income so required to be returned is subject to certain exemptions and deductions, and the net income thus arrived at is taxed on a graduated scale.

Section 1 of Article 3, above quoted, was not affected by the Sixteenth Amendment declaring that

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration,"

because this amendment has been determined not to extend the power of taxation of incomes to subjects previously exempt, but only to remove the necessity for apportionment with reference to income taxes. *Peck v. Lowe*, 247 U. S. 165, 172; *Brushaber v. Union Pacific R. R.* 240 U. S. 1; *Stanton v. Baltic Mining Co.*, 240 U. S. 103.

Not only is the presumption in favor of the validity of the act, but the question must be free from reasonable doubt to justify holding to the contrary. *Nicol v. Ames*, 173 U. S. 509.

The constitutional provision referred to (Section 1 of Article 3) does not exempt the judges from taxation, generally speaking. They are subject to the taxing power equally with other citizens. Indeed, their salaries, insofar as used to defray their living expenses, or otherwise consumed by them, have been

laid under indirect taxation by duties, imposts and excises since the beginning of the government, and if the revenue now exacted by income tax has been raised by the familiar indirect means, the judicial salary would have been, without question, subject thereto in its expenditure as in the past. Therefore, a tax is not invalid merely because it may operate indirectly or incidentally to require repayment to the government of some part of the money paid out as judicial salary.

Since the judge is, as others, subject to taxation, it may be stated that he owes the government his fair share of the burden which the United States is obliged to impose upon its citizens for its support. On the other hand, the government owes to him an undiminished compensation. But these are two independent accounts; neither may be justly said to impair the other.

If a tax were indirectly laid upon judicial salary, as such, and "because of its source or in a discriminative way" *Peck v. Lowe*, 247 U. S. 172), it might perhaps, fairly be claimed to be a diminution of compensation. But a tax laid on incomes generally, including judicial salary, without discrimination, at a uniform rate, seems to be nothing other than the requiring of the judge his fair share of the burden aforesaid, measured by his income. His salary is not thereby diminished; his income is merely used as the fairest measure of his tax. The tax is, in

effect, imposed upon the citizen in proportion to income.

It is said that Congress is bound by no general rule of equality in the laying of the income tax; that it may classify persons for taxation at pleasure, and that the judges may be put in a class by themselves or in an unfavored class and their salaries taxed, to the destruction of that judicial independence the Constitution unquestionably sought to protect. (Federalist No. 79; 2 Story Const. Sec. 1628, *et seq.*; 1 Kent, Com. 293). But there seems to be an inherent, fundamental distinction between equal participation in the general burden of a uniform income tax, and subjection to a discriminative salary tax. The one appears not to be directed against salaries, as such, but to fall only incidentally thereon, and therefore not to be a diminution thereof within the constitutional phrase. The other, merely seeking by classification to reclaim part of that paid out in compensation, might, without injustice, be regarded as a diminution of the salary under the guise of taxation. For the purpose of deciding upon its validity, a tax should be regarded in its actual and practical, rather than its theoretical results. *Nicol v. Ames* (*supra*), at p. 516.

There appears to be no adjudication of this point by any court of the United States. It was, however, the subject of a letter from Chief Justice Taney to the Honorable Salmon P. Chase, Secretary of the

Treasury, condemning as invalid a similar tax. 157 U. S. 701.

That a general income tax would fail upon judicial salaries was likewise assigned by Mr. Justice Field as an additional reason for the unconstitutionality of the income tax of 1894, in a separate concurring opinion, in the case of *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 428, 604; but the point was not touched by the opinion of the court, and the unconstitutionality of that Act was placed thereby upon entirely different grounds.

There is also an opinion by Attorney General Hear, addressed to the Honorable George S. Boutwell, Secretary of the Treasury, October 23, 1869 (13 Op., Atty. Gen. 161), upon the constitutionality of the Act of 1867, taxing salaries of all civil officers of the United States and concluding that no income tax may be lawfully assessed and collected upon the salaries of the President or any of the judges who were in office at the time the statute imposing the tax was passed.

A similar conclusion was reached by the Attorney General of North Carolina, in a letter to the Honorable David M. Furches, Chief Justice for that state, dated December 16, 192 (131 N. C. 693).

The present Attorney General of the United States has, upon full consideration, concluded in favor of the validity of the tax. (Opinion of Mr. Attorney General A. Mitchell Palmer to the Secretary of the Treasury, May 6, 1919, 31 Op. Atty. Gen. 475.)

It can not be denied that the foregoing opinions, although not bringing the point under the rule of *stare decisis*, are entitled to great weight.

In *Commonwealth, ex rel. v. Mann*, 5 Watts and Sergeant, 403, the Supreme Court of Pennsylvania determined that an act which assessed upon the salaries of judges a tax of two per cent, which the State Treasurer, by the provision of the law, was directed to retain, was contrary to a provision of the state constitution forbidding diminution of judicial compensation. The terms of the act are to be found on page 415. The tax was not general, but was specifically directed against the salaries of officers held in Pennsylvania, and the court, at page 417, used this significant language:

“Taxation is an incident of sovereign power which acknowledges no limits except the discretion of those who use it, unless it be those objects of taxation which for wise reasons have been withdrawn from these general powers. The property of a judge, his income, whether derived from this or any other source, we admit is a proper subject of taxation. His security will then consist in being placed on the same footing with other citizens, and an abuse of them by any will be speedily corrected. Of this the relator does not complain; but he does complain that he, with others, is selected as a special object of taxation, contrary to the charter which he has solemnly sworn to support.”

Thus, clearly, this decision was placed upon the discriminative feature of the tax, and the opinion specifically affirms the validity of a tax such as that now under consideration.

In *Commissioners v. Chapman*, 2 Rawle, 72, the Supreme Court of the same state had previously held that a tax levied upon the defendant for his office as President Judge of a judicial district of Pennsylvania, by the laws for raising county rates and levies, was not unconstitutional, and the court said (p. 77):

“The object of the legislature was to apportion the public burden according to the ratio of property, and to produce in detail a result approaching as near as possible to that of an income tax—a measure of assessment more equable in the abstract than any other that could be proposed. * * * The legislature could not constitutionally retrench a part of a judge’s salary under the pretext of assessing a tax on it; but, for the bona fide purpose of contribution, a reasonable portion of it, like any other part of his property, may be applied to the public exigencies.”

There is nothing irreconcilable in these two decisions. The one condemning a special tax on salaries admits the propriety of a general tax on incomes, including the judicial salary; the other upholds the latter form of taxation. The distinction between these two cases would seem to define clearly the boundary line between diminution of salary by special taxation and the taxing of incomes generally, including such salaries.

In *State v. Nygaard*, 159 Wis. 396, as against a similar constitutional provision, the statute levying an income tax by uniform rule, which fell upon the salaries of judges as upon others, was upheld, but the case was put principally upon an amendment of the constitution of that state adopted in 1908, authorizing generally the laying of income taxes, from which the court could find no reason for excepting judicial salaries.

In *New Orleans v. Lea*, 14 La. Ann. 197, an attempted tax by the city of New Orleans upon the salary of a justice of the Supreme Court of that state, was held void, as contravening a similar constitutional provision. The decision was based upon *McCulloch v. Maryland*, 4 Wheat. 316, but the decision there obviously turns upon a different principle, to-wit, the power of the state to tax an instrumentality of the Government of the United States; and it is worth noticing that the decision went no further than was necessary to protect from taxation the sovereign powers of the United States, and was specifically restricted so as not to extend to a tax paid by the real property of the bank in common with other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland might hold in the institution, in common with other property of the same description throughout the state.

Dobbins v. Commissioners, 16 Pet. 435, and *Collector v. Day*, 11 Wall. 113, proceed upon the same

principle, or its converse, the immunity of the instrumentalities of the state government from federal taxation, and can not be said to be a guide in the solution of the question presented in this case.

That income may be taxable, although derived from sources in themselves exempt from taxation, is demonstrated by the decisions in *Peck v. Lowe*, *supra*, holding that income derived from the export trade is taxable; and *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321, holding that a state may lay a general income tax including corporate profits derived from interstate commerce. In the latter case, at p. 328, the court says:

“The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to Secs. 8 and 10 of Article I of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the state a part of every dollar received. On the other hand, in *Peck & Co. v. Lowe*, ante, 165, we held that the Income Tax Act of October 3, 1913, c. 16, Sec. 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was

derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. 1, Sec. 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden."

It seems, therefore, that the tax which the plaintiff now sues to recover is at most but an indirect or incidental burden upon judicial compensation resulting from a uniform and general income tax, and is therefore not a diminution of such compensation within the meaning of the Constitution. The demurrer to the petition must accordingly be sustained.

ASSIGNMENT OF ERRORS.

The plaintiff, Walter Evans, files this his Assignment of Errors, to-wit:

1. The Court erred in sustaining the defendant's demurrer to the petition herein; and in dismissing the plaintiff's petition.

2. The Court erred in holding that so much of Sections 210 and 213 of the Act of Congress entitled "*An Act to provide revenue and for other pur-*

poses," approved February 24, 1919 (40 Stat. 1065), as provides for the taxation of the salaries received by the Judges of the District Courts of the United States as their compensation as such Judges, is constitutional.

3. The Court erred in holding that so much of Sections 210 and 213 of said Act of February 24, 1919, as provides for the taxation by Congress of the salaries received by the Judges of the District Courts of the United States as such Judges (where the Judges were appointed and qualified before the passage of the Act), is not in conflict with Article 3, Section 1, of the Constitution of the United States.

WHEREFORE the plaintiff prays that the judgment herein be reversed.

FRANK P. STRAUS,

HOWARD B. LEE,

HELM BRUCE,

WM. MARSHALL BULLITT,

EDMUND F. TRABUE,

Attorneys for the Plaintiff.

STIPULATION.

IT IS STIPULATED between the plaintiff and the defendant:

1. That upon the Writ of Error to review the final judgment herein, the following papers and no others shall constitute the entire Transcript of Record on such Writ of Error.

1. Petition.
2. Demurrer thereto.
3. Opinion sustaining the Demurrer.
4. Final Judgment entered December 23, 1919.
5. Assignment of Errors.
6. This Stipulation.
7. Writ of Error.
8. Clerk's Certificate.

2. That the issuance and service of citation is hereby waived, and the defendant's appearance is hereby entered in the Supreme Court of the United States.

FRANK P. STRAUS,
HOWARD B. LEE,
HELM BRUCE,
WM. MARSHALL BULLITT,
EDMUND F. TRABUE,
Counsel for Plaintiff.
W. V. GREGORY, U. S. Atty.,
S. M. RUSSELL, Ass't U. S. Atty.,
Counsel for Defendant.

WRIT OF ERROR—Allowed December 23, 1919.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF KENTUCKY, SIXTH JUDICIAL CIRCUIT.	}	SS.
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The President of the United States.

To the Honorable John W. Peck, Judge of the District Court of the United States, for the Southern District of Ohio, sitting by designation as Judge of the District Court of the United States, for the Western District of Kentucky, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between WALTER EVANS, PLAINTIFF, and J. ROGERS GORE, DEPUTY AND ACTING COLLECTOR OF INTERNAL REVENUE, DEFENDANT, a manifest error hath happened, to the great damage of the said plaintiff, Walter Evans, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the SUPREME COURT OF THE UNITED STATES, together with this writ, so that you have the same at Washington, in the District of Columbia, on the 19th day of January next, in the said Supreme Court of

the United States, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the HONORABLE EDWARD D. WHITE, Chief Justice of the United States, the 23rd day of December, in the year of our Lord, 1919, and of the Independence of the United States of America the one hundred and forty-fourth.

A. G. RONALD,
Clerk of U. S. District Court, W. D. of Ky.

UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF KENTUCKY. } SS.

I, A. G. RONALD, Clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing transcript consisting of 27 pages, constitutes a full, true and correct Transcript of the Record and proceedings had in said Court in the cause of Walter Evans, Plaintiff-in-Error v. J. Rogers Gore, Defendant-in-Error, as the same remains of record and on file in my said office, and pursuant to the stipulation of counsel filed herein.

WITNESS my hand and the official seal of the said Court this 26th day of December, 1919.

A. G. RONALD, *Clerk.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 6572

WALTER EVANS,

Plaintiff-in-Error,

VERSUS

**J. ROGERS GORE, DEPUTY AND ACTING COLLECTOR OF
INTERNAL REVENUE ETC.,**

Defendant-in-Error.

MOTION TO ADVANCE.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY.**

**FRANK P. STRAUS,
HOWARD B. LEE,**

**WM. MARSHALL BULLITT,
EDMUND F. TRABUE,
HELM BRUCE,**

Counsel for Plaintiff-in-Error.

Notice of the within motion is hereby acknowledged.

W. V. GREGORY, U. S. Attorney,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No.

WALTER EVANS, - - - - - *Plaintiff in Error,*

vs. **MOTION TO ADVANCE.**

J. ROGERS GORE, DEPUTY AND ACTING COL-
LECTOR OF INTERNAL REVENUE, - *Defendant in Error.*

*In Error to the District Court of the United States for the
Western District of Kentucky.*

The plaintiff in error, Walter Evans, moves that this cause be advanced for hearing at an early date for the following reasons to-wit:

1. The sole question involved is the constitutionality of so much of the Federal Income Tax Law of February 24, 1919 (40 Stat. 1065), *as taxes the salaries received by Federal Judges* as their compensation as such Judges, where the Judges were appointed and qualified before the passage of the Act.

2. The point to be decided is whether an income tax levied upon such salaries is or is not a diminution of their compensation in violation of Article, 3 Section 1 of the Constitution, which provides that the Federal Judges shall receive "a compensation which shall not be diminished during their continuance in office."

3. This case is of public importance, not on account of the trifling sum involved, but because of the importance of the question whether the power of taxation, and the power of classification incident thereto, can fritter away a constitutional prohibition against the compensation of Federal Judges being lessened during their official terms.

FRANK P. STRAUS,
HOWARD B. LEE.

WM. MARSHALL BULLITT,
EDMUND F. TRABUE,
HELM BRUCE,
Counsel for Plaintiff in Error.

January 5, 1920.

4

TAXATION OF SALARIES OF FEDERAL JUDICIARY.

Supreme Court of the United States.

No. 654. OCTOBER TERM, 1919.

WALTER EVANS,

Plaintiff in Error,

vs.

J. ROGERS GORE, Deputy and Acting Collector of Internal
Revenue, *Defendant in Error.*

*In error to the District Court of the United States for the
Western District of Kentucky.*

BRIEF FOR PLAINTIFF IN ERROR

Supporting the view that the Act imposing taxation on
judicial compensation is unconstitutional.

WALTER EVANS,
Pro Se.

FRANK P. STRAUS,
HOWARD B. LEE,
WM. MARSHALL BULLITT,
EDMUND F. TRABUE,
HELM BRUCE,
Of Counsel.

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Supreme Court of the United States.

No. 654. OCTOBER TERM, 1919.

WALTER EVANS,

Plaintiff in Error,

vs.

J. ROGERS GORE, Deputy and Acting Collector of Internal
Revenue, *Defendant in Error.*

*On Writ of Error to the District Court of the United States
for the Western District of Kentucky.*

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

Section 213 of the Act entitled "*An Act to provide revenue, and for other purposes,*" approved February 24, 1919 (40 Stats. 1065), under the title "*Gross Income Defined,*" provides that

"for the purposes of that title *gross income includes* gains, profits, and income derived from *salaries, wages and compensation for personal services (including in the case of the President of the United States, the judges of the supreme and inferior courts of the United States * * * the compensation received as such)* of whatever kind and in whatever form paid * * * and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer," etc.

There could be no doubt that Congress thereby intended to impose income taxation on the "*compensation received as such*" of the judges; and, under the express requirement of this provision, the plaintiff in error (throughout this Brief called the plaintiff), in his individual Income Tax Return for the year 1918, included the sum of \$6,000.00, the compensation and salary which, during that year, had been paid to him under the law of the United States as the United States District Judge for the Western District of Kentucky, which office he had held and the duties of which he had discharged during that entire year, as also he had done during many previous years.

Upon the face of that return he protested against being required to include therein his compensation as Judge upon the ground that the Act requiring it was violative of the CONSTITUTION of the United States. This return showed that, allowing all the deductions permitted by said Act, the normal tax on plaintiff's compensation as such Judge was \$192.90 and the sur-tax thereon was \$83.57, a total of \$276.47 for the taxable year 1918.

It was made and delivered to the defendant, who was then the Deputy and Acting Collector of Internal Revenue for the Fifth District of Kentucky, on March 12, 1919, at which time plain-

tiff paid to him the sum of \$276.47 in full of the taxes on plaintiff's compensation as such Judge. In thus paying in full he exercised the option given him by Section 250a of the Act.

At the time of making the payment plaintiff delivered to the defendant a statement in writing informing him that the payment was made under protest and that plaintiff would sue him (the Deputy and Acting Collector) for the recovery of the amount paid with interest from the date of payment. This protest is set out in full in plaintiff's petition, and stated the ground thereof to be that the statute under which the taxation is imposed and collected is, so far as that taxation is laid on the compensation of the judges, violative of Article 3, Section 1, of the CONSTITUTION of the United States.

To meet the provisions of Section 3226 of the Revised Statutes (Section 5949 of the Compiled Statutes, 1916, Vol. 6), the plaintiff, on March 18, 1919, in due form made an appeal in the only admissible way, namely, on Form 46, to the Commissioner of Internal Revenue under Section 1316 of the said Act (40 Stats. 1145) which amends Section 3220 of the Revised Statutes (Section 5944, Comp. Stats. 1916) for the refunding to him of the amount so paid as income taxation on his "compensation received as such," to wit, \$276.47, and supported the same with

clear and explicit proof of the facts upon which the refunding of the \$276.47 was sought.

On September 9, 1919, this application was wholly denied by the Commissioner of Internal Revenue.

Under these circumstances this action was brought by the plaintiff against the defendant, who received payment of said taxes and who, personally, is protected from loss by Section 1316 of the Act.

The court below sustained a general demurrer to the petition. Plaintiff declined to plead further and judgment was rendered dismissing his action. The constitutionality of a law of the United States is drawn in question by plaintiff's suit, and thereby is presented the sole issue involved. In these circumstances the case was brought directly to this Court under Section 238 of the Judicial Code.

ASSIGNMENT OF ERRORS.

The errors assigned are as follows, viz.:

1. The Court erred in sustaining the defendant's demurrer to the petition herein; and in dismissing the plaintiff's petition.

2. The Court erred in holding that so much of Sections 210 and 213 of the Act of Congress entitled "An Act to provide revenue and for other purposes," approved February 24, 1919 (40 Stats. 1065),

as provides for the taxation of the salaries received by the Judges of the District Courts of the United States as their compensation as such Judges, is constitutional.

3. The Court erred in holding that so much of Sections 210 and 213 of said Act of February 24, 1919, as provides for the taxation by Congress of the salaries received by the Judges of the District Courts of the United States as such Judges (where the Judges were appointed and qualified before the passage of the Act), is not in conflict with Article 3, Section 1, of the Constitution of the United States.

The Proper Procedure.

That the plaintiff pursued the proper course for obtaining the relief sought is established by so many authorities as to be familiar. (*Patten v. Brady*, 184 U. S. 614, and *Pacific Whaling Co. v. United States*, 187 U. S. 452-3.)

Mr. Justice WHITE succinctly stated it in his dissenting opinion in *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 609, where he said:

“The decisions of this court hold that the collection of a tax levied by the government of the United States will not be restrained by its courts. *Cheat-ham v. United States*, 92 U. S. 85; *Snyder v. Marks*, 109 U. S. 189. See also *Elliott v. Swartout*, 10 Pet.

137; *City of Philadelphia v. The Collector*, 5 Wall. 720; *Hornthall v. The Collector*, 9 Wall. 560. The same authorities have established the rule that the proper course in a case of illegal taxation is to pay the tax under protest or with notice of suit, and then bring an action against the officers who collected it. The statute law of the United States, in express terms, gives a party who has paid a tax under protest the right to sue for its recovery. Rev. Stats. Sec. 3226."

The Constitutional Question Involved.

The provisions of Section 213 of the Act of February 24, 1919, are plain and clear in their requirements that all judges of the Supreme and inferior courts of the United States (1) shall respectively include the amount of their "compensation received as such" in their income tax returns "for the taxable year in which received by the taxpayer," and (2) shall pay to the Collector of Internal Revenue the income tax imposed thereon by Section 210 of the Act.

The one question sought to be settled in this suit is whether or not those requirements of the Act are violative of the CONSTITUTION of the United States.

The importance of this question is manifest not, of course, from the somewhat negligible amount of money sought to be recovered but from the vital nature of the constitutional principle at stake. If, in

this commercial age and amidst tendencies which probably should be held in check, that principle (so clearly expounded, as we shall see, in No. 79 of the Federalist) is worth less to this country and her people than the relatively insignificant amount of money to be obtained from income taxation on judicial salaries, it is not worth the trouble of this effort for its vindication, and this suit had as well be dismissed upon the idea *de minimis non curat lex*; but, otherwise, it is worth all the labor that can be bestowed upon it, to say nothing of any cost that may be incurred. The essential character of that principle, so far as now involved, has been exalted to a place second to none in importance by our most eminent jurists and writers on the CONSTITUTION. Upon the same grounds its support is now sought at a time and in a state of general unrest when the Constitution and its obligations should in no way become stale nor its limitations irksome.

Article 3, Section 1, of the CONSTITUTION as proposed by the Convention which framed it, and as it was adopted by the people of the Federation, is as follows:

“The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices

during good behavior, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office.”

Obviously this fundamental provision is the chief corner-stone of the judicial system of the nation, and, we most respectfully submit, that the clause therein now to be definitely construed means, and clearly was designed to provide that the compensation of the judges shall not at any time nor in any manner be diminished during their continuance, respectively, in office.

When the adoption of the CONSTITUTION was under discussion by the great men to whom all are so much indebted, few, if any, of its Articles were regarded as more important than was the THIRD. This was so in a somewhat special sense, inasmuch as the independence of the Judiciary and the means for making it so, namely, *first*, by a permanency of official tenure, and *second*, by an undiminishable compensation, were thereby provided.

It fell largely to ALEXANDER HAMILTON, one of the greatest intellects of all time, to explain and uphold both of those propositions. After discussing in No. 73 of the Federalist with great power, the provision of the CONSTITUTION concerning the undiminishable compensation of the President (much of what he

then said being quite as applicable here), he, in No. 78, took up the question of the permanency of the official tenure of the Judges, and demonstrated the indispensable necessity for that to be guarded; and in No. 79 came to the question involved in the last clause of Article 3, Section 1, which here has the most pertinent application, and said:

“Next to permanency in office, nothing can contribute more to the independence of the Judges, than a fixed provision for their support. The remark made in relation to the President, is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resource on the occasional grants of the latter. The enlightened friends to good government, in every state, have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the Judges; *but the experiment has in some instances shown, that such expressions are not sufficiently definite to preclude legislative evasions.* Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided, that the Judges of the United States ‘shall at *stated times* receive for their services a compensation, which shall not be *diminished* during their continuance in office.’

“This, all circumstances considered, is the most

eligible provision that could have been devised. It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate.

“It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions *as to put it out of the power of that body to change the condition of the individual for the worse.*

“A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular Judge comes into office, in respect to him.

“It will be observed that a difference has been made by the convention between the compensation of the President and of the Judges. That of the former can neither be increased *nor* diminished. That of the latter can only not be *diminished*. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the Judges, who if they behave properly, will be secured in their

places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

“This provision for the support of the Judges bears every mark of prudence and efficiency; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regard to their own judges.”

Mr. Justice STORY, in his Commentaries on the CONSTITUTION, Section 1629, 1630 and 1631, has inserted in full all that we have just copied from the Federalist; preceding it, in Section 1628, with this strong statement:

“The next clause of the constitution declares, that the judges of the supreme and interior courts ‘shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.’ Without this provision the other, as to their tenure of office, would have been utterly nugatory, and indeed a mere mockery. The Federalist has here also spoken in language so direct and convincing, that it supersedes all other argument.”

In 1st Kent’s Commentaries, star pages 293-4, it was said by the great chancellor that—

“In monarchical governments, the independence of the judiciary is essential to guard the rights of

the subject from the injustice of the crown; but in republics it is equally salutary, in protecting the Constitution and laws from the encroachments and the tyranny of faction. Laws, however wholesome or necessary, are frequently the object of temporary aversion, and sometimes of popular resistance. It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts; and to deal impartially and truly, according to law, between suitors of every description, whether the cause, the question, or the party be popular or unpopular. To give them the courage and the firmness to do it, the judges ought to be confident of the security of their salaries and station.

“Nor is an independent judiciary less useful as a check upon the legislative power, which is sometimes disposed, from the force of party, or the temptations of interest, to make a sacrifice of constitutional rights; and it is a wise and necessary principle of our government, as will be shown hereafter in the course of these lectures, that legislative acts are subject to the severe scrutiny and impartial interpretation of the courts of justice, who are bound to regard the Constitution as the paramount law, and the highest evidence of the will of the people.

“The provision for the permanent support of the judges is well calculated, in addition to the tenure of the office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution

of the United States, on this subject, was an improvement upon all our previously existing constitutions.”

The subject came before the Supreme Court somewhat incidentally in the case of *Benedict v. United States*, 176 U. S. 357, and in its opinion, at page 360 of the report, it was said:

“The case in reality turns upon the meaning of the word ‘salary,’ as used in Section 714. The word ‘salary’ may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered. *Thompson v. Phillips*, 12 Ohio St. 617; *Landis v. Lincoln County*, 31 Oregon 427; *Dane v. Smith*, 54 Alabama 49; *State v. Murphy*, 24 Florida 33; *Castle v. Lawler*, 47 Conn. 345; *Commonwealth v. Butler*, 99 Penn. St. 542. As applied to District Judges in general, and indeed to every District Judge except the Judge of the Eastern District of New York, it doubtless refers to the salary of \$5000 fixed by the act of February 24, 1891. Such salary is an annual stipend, payable in sickness as well as in health, for duties much more onerous in some districts than in others, and regardless of the fact whether such duties are performed by the Judge in person, or by the Judge of another district called in to take his place. It is a compensation which can not be diminished during the continuance of the incumbent in office, and of which he can not be deprived except by death, resignation or impeachment.”

See also Tucker on the Constitution of the United States, Vol. 2, Section 364.

The Constitution of Kentucky has provisions forbidding the diminution of the salaries of several classes of officers, including the judges of the State, and strong opinions upholding and enforcing those provisions may be found referred to and some of them discussed in the elaborate opinion of the Court of Appeals in *Greene v. Cohen*, 181 Ky. 108.

That the power to tax implies the power to destroy is a proposition of the utmost importance in this connection, and has probably never been disputed since CHIEF JUSTICE MARSHALL, in delivering the opinion of the Court in *McCulloch v. Maryland*, 4 Wheaton, 316, 431, said:

“That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create, * * * are propositions not to be denied.”

DOES THE TAXATION IMPOSED ON JUDICIAL SALARIES DIMINISH THE COMPENSATION OF THE JUDGES?

This is the fundamental question involved. If it be answered in the negative it may end this case, but if in the affirmative, then, upon grounds presently to be stated, effective operation of Section 1 of Article

3 of the CONSTITUTION is thereby insured against all that is threatened by the legislation now in question.

It is obvious that diminution may be brought about in more ways than one. Some of those ways may be open and direct, while others, equally effective, may be indirect or evasive as feared by Hamilton. Each, however, will accomplish the same result and eventually *that result* must supply the test of whether or not there has been diminution.

A statute might in express terms lower a judge's salary as then fixed. That, palpably, would diminish it and thus clearly bring the legislation within the constitutional inhibition. The compensation of the judges is fixed at a stated amount which is made payable annually in twelve monthly installments. Payment of the taxes laid thereon becomes an inchoate obligation of the judge to the Government *eo instanti* the monthly installment of compensation is paid to him by the United States, and the same accumulative result follows payment of each installment in succession throughout the year.

If a judge should die or resign, the obligation to pay those taxes in respect to each installment of salary theretofore paid to him, continues.

All this is true although the *collection* of what is due under the previously and successively fixed obligations to pay the taxes, is postponed until the year-

ly income is fully ascertained a few months afterwards by the return of the taxpayer. All the taxation which inchoately rests upon each one of the installments when it is paid simultaneously creates an obligation to pay money which must ultimately come into the Treasury of the United States; and the result will be, in the case of a District Judge, that in 1918, he realized not the fixed compensation of \$6,000, but that sum so reduced by the taxation *expressly laid thereon*, as to amount, say, to only about \$5,700. The result is the same, namely, a diminution of the compensation of the Judge "during his continuance in office" whether it was lowered (a) in express terms or (b) by taxation expressly imposed thereon as such. And is it not indeed manifest that the taxation laid and collected by the United States *itself* upon the compensation as such which *it* pays to the Judge, *is* a diminution of that compensation—the taking back from the Judge a little later by one hand of a part of what had been paid to him with the other? The actual payment in cash by the taxpayer of the amount of the taxes expressly imposed on his compensation as such, *demonstrates* that there has thereby been a diminution thereof, while the *ingenuity* of the advocate can only plausibly *theorize that there was none*.

Income taxation upon the compensation of the Judges imposed by Sections 210 and 213 (we can hardly repeat too often) is expressly and in the most explicit terms laid upon that very compensation for the year in which it was received, and that it is thereby diminished is certain. That this is the correct view, seems not only to be self-evident (which makes it difficult to add to its clarity), but it is supported by the most noted jurists and writers. However, before quoting from them we may earnestly insist that "deducting" the amount of the taxation from the compensation *before* its payment (as provided in former laws) was in no way different in its result from the *return to the United States under compulsion* of part of that compensation *after* it had been paid.

The opinion of Attorney General Hoar in 1869 (Volume 13, Opinions of the Attorney General, page 161) discussed the provisions of the Act of March 2, 1867, found in 14 Stats., page 478, and explicitly advised the Secretary of the Treasury that the taxation thereby imposed, if exacted on judicial salaries would be in plain violation of Section 3, Article 1, of the CONSTITUTION, and could not be sustained because such taxation clearly involved a diminution of the compensation of the Judges.

In his opinion, page 162, it was said:

“A specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would, by law, be payable as such salary, is, in my opinion, a diminution of the compensation to be paid to him, which, in the case of the President and the judges, would be prohibited by the Constitution of the United States, if the Act of Congress levying the tax were passed during the official term of the President or of the judges respectively concerning whom the question should arise.

“It was held in the case of *Dobbins v. The Commissioners of Erie County* (16 Pet. 435), that the compensation of an officer of the United States, fixed by a law of Congress, was not subject to taxation under State authority, because the effect of such a tax would be to diminish the compensation which the officer was by law entitled to receive. Such a tax was held to interfere with the provision made by the United States for the due execution of the powers and functions of the National Government by means of officers which it appointed and paid. In the case of *The Pacific Insurance Company v. Soule*, (7 Wall. 434) it was decided that an income tax was an excise or duty imposed by a statute of the United States relating to internal revenue.

Congress, being prohibited by the Constitution from diminishing the salaries to be paid to the judges of the Supreme Court and the President during their respective terms of office, can no more do it by levying an excise or duty upon those salaries and deducting the amount thereof from them, than could a State from that of an officer of the United States under the doctrine of the case in 16 Peters' Reports.

The tax directly operates as a diminution of the compensation of the officer.

“I am, therefore, of opinion that no income tax could be lawfully assessed and collected upon the salaries of the President or any of the Judges who were in office at the time the statute imposing the tax was passed.”

The Act then under discussion was, in terms, different from that of February 24, 1919. Under it, the tax on official salaries was collected at the source, by withholding it when each installment of compensation was paid, while in the last Act the income taxation is laid on the judge's “compensation received as such,” and its collection is enforceable through penalties prescribed for failure to pay promptly.

In 131 N. C. 693 there is reported a certain letter written by the Chief Justice of that State to the Attorney General thereof and the Opinion of the latter respecting State legislation involving questions very similar to those now being considered. They are to be found on pages 693 to 701 inclusive in

“The Matter of the Taxation of the Salaries of Judges.”
(131 N. C. 693).

In the quite elaborate letter of the Attorney General we find reference to many cases, among them *McCulloch v. Maryland*, 4 Wheaton 316, *Common-*

wealth v. Mann, 5 Watts and Sargeant 403, and on page 699 he says:

“The Federal Constitution contains a provision similar to that appearing in the Constitution of our own State—that the salaries of the judges shall not be diminished during their continuance in office. Under an act of Congress, imposing a tax of three per cent on the salaries of all the officers in the employment of the United States Government, the Treasury Department held that judicial officers were embraced within its terms. On February 16th, 1863, Judge Taney, who was then Chief Justice of the Supreme Court of the United States, addressed a letter to the Honorable, the Secretary of the Treasury, and from it the following paragraph is taken: ‘The act in question, as you interpret it, diminishes the compensation of every judge three per cent; and if it can be diminished to that extent by the name of a tax, it may, in the same way, be reduced, from time to time, at the pleasure of the Legislature.’

“It is true that the act of Congress, passed upon by Chief Justice Taney, as well as in the case of *Commonwealth v. Mann*, 5 Watts and Sargeant, page 403, cited by Attorney General Bachelor (Appendix, 48 N. C. Report), the tax levied was deducted from the compensation fixed by law and retained in the Treasury. But in what way the method of collecting the tax imposed upon the salary affects the question involved, I am utterly unable to perceive. The principle announced by Chief Justice Taney, as well as the Supreme Court of Pennsylvania, in *Commonwealth v. Mann*, *supra*, operates upon the power to tax, and not upon the incidental means employed to collect.”

The letter of CHIEF JUSTICE TANEY is printed in full in the Appendix to 157 U. S. In it, among other things, it was said:

“The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

“The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

“Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislature and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.”

Very striking comments (evidently of high approval) were made upon this letter by Mr. Justice

FIELD in his separate opinion in *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 605, 606. Equally approving was what he then said on pages 606 and 607 about Attorney General Hoar's opinion. The remarks of the Justice respecting the latter contained this statement:

"I am informed that it has been followed ever since without question by the Department supervising or directing the collection of the public revenues."

And so it continued for half a century, and until a need for revenue (a condition chronic in 1776 and 1789 and ever since) was supposed to supply a plausible excuse for changing back to that which CHIEF JUSTICE TANEY and Attorney General Hoar and many others had found to violate the Constitution of the United States. That "excuse" existed when the CONSTITUTION was under discussion in the 18th century, but, we think significantly, it was not regarded as affording any reason for inserting a clause in Section 1, Article 3, authorizing Congress to impose taxation on that compensation which it declared should not be diminished.

ATTORNEY GENERAL PALMER'S OPINION.

The fact has not been overlooked that the present distinguished ATTORNEY GENERAL, on May 6, 1919, in an opinion given to the Secretary of the Treasury,

has taken the position that the legislation impugned in this suit is not violative of the CONSTITUTION, and has thus brought himself in direct conflict with all the great authorities we have cited, to say nothing of others presently to be mentioned.

In that situation it might be better to let his argument be met and confuted by those authorities as well as by the explicit provisions of the CONSTITUTION itself, when compared with the plain words of the Act, both of which we have copied, and especially as a careful analysis of the opinion in each of the cases cited by the ATTORNEY GENERAL seems clearly to show that with four exceptions no one of them appears definitely to bear upon the one constitutional question involved here.

Those exceptions are, *first*, *Peck & Co. v. Lowe, Collector*, 247 U. S. 165, 172-3, which is one of the strong and direct authorities hereinafter cited in support of the proposition that the 16TH AMENDMENT can in no way justify or support that provision of the revenue Act, the constitutionality of which is now in question.

A *second* is *City of New Orleans v. Lea*, 14 La. An. 194, which explicitly holds, as shown by the syllabus and as abundantly supported by the text, that article 75 of the Constitution of Louisiana, which, in language quite similar to that of the CONSTITUTION of

the United States, provides that "the judges, both of the supreme and inferior courts shall at stated times receive a salary which shall not be diminished during their continuance in office," *exempts the salary of a judge from taxation because it would be thereby diminished.* The Supreme Court in its opinion, putting it about as strongly and tersely as it could be expressed, said:

"If the right to tax the salary of judges be conceded, there would be no limitation but the discretion of the legislature to do it to such an extent as virtually to abolish the means of conducting the judicial department. Its existence ought not to depend upon the will of a co-ordinate department.

* * * * *

"It may be, that the restriction in this Article upon the power of the legislature refers principally to the diminution of the salaries of the Judges by a law fixing it at a less amount than that established at the epoch of their entrance into office.

"The object, however, of this Article was to secure the independence of the judiciary. If the legislature can tax the salaries, it would be deprived of its plenary effect."

A *third* is *State v. Nygaard*, 159 Wis. 396. There a judge of one of the lower courts of the State had raised the question of the constitutionality of a statute under which his salary for 1912 had been subjected to taxation in 1913. The determination of the question rested upon the constitution of the State

alone. There were *three* provisions which had to be considered together. One of them was in this language:

“Nor shall the compensation of any public officer be increased or diminished during his term of office.”

Another was that

“the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe,”

And the third was the amendment to the constitution adopted in 1908 in this language:

“Taxes may also be imposed on income, privileges and occupations, which tax may be graduated and progressive, and reasonable exemptions may be provided.”

It was upon the *construction* by the Supreme Court of Wisconsin of these three provisions *taken together* that the taxation was upheld. That case differed widely from this, if in no other respect, that there is no provision in the Constitution of the United States requiring *uniformity* in “*taxation*,” though there is such a rule respecting “duties, imports and excises.” (Art. 1, Sec. 8.) This fact will no doubt be regarded as most important when Article 3, Section 1 of the CONSTITUTION is to be construed.

The *fourth* and last of the exceptions referred to

is the case of *Commissioners v. Chapman*, 2 Rawle (Pa.) 73, which does support the ATTORNEY GENERAL'S view. It was decided in 1829, but it appears to be certain that while that case is not mentioned, the doctrine it announced was overruled by the decision in the case of *Commonwealth v. Mann*, 5 Watts & Sargeant 403, decided in 1843, in which it was explicitly held that the legislature *did not have the constitutional power to diminish by taxation the compensation fixed by law for the judges of the Common Pleas Court during their continuance in office*—exactly the same proposition decided the other way in the earlier case. The comments on the last named case by the Superior Court and by the Supreme Court of Pennsylvania, in their opinions in the case of *Commonwealth v. Mathues*, 210 Penn. 394, 395, 399 and 423, indicate how certainly the ruling in the *Mann* case was approved by both, and how thoroughly the *Chapman* case has been *discredited* in the jurisprudence of Pennsylvania.

We may, however, add that apart from the 16TH AMENDMENT, which will be discussed further along, the ATTORNEY GENERAL'S view appears to be that the income taxation expressly imposed upon that "compensation received as such" for the taxable year in which it is earned, does not diminish it, because the return of income and payment of the taxation are

exacted *after* the compensation has all been received. This view, which was adopted and acted upon by the court below seems to lack even plausibility. The compensation of a judge, like all other income, is received in the year before any return thereof is made, and of course before the tax thereon is paid. This is called the "taxable year." Everything in respect to the return and payment of income taxation is done in the year after the income was received, and not in the taxable year. All the income received in the taxable year is subject to the taxation to be paid in the succeeding year. That taxation rests *upon the compensation as such of the judge* for the taxable year in which it was received, and not for the year in which it was paid. It is doubtless well known as a fact by every payer of income taxation that his income for the taxable year is more or less greatly diminished by the taxation collected upon that income the following year.

This part of defendant's contention could hardly be better met than by repeating here a few lines from the Opinion of the Attorney General of North Carolina already cited, wherein he said: "But in what way the method of *collecting* the tax imposed upon the salary affects the question involved I am utterly unable to perceive. The principle announced by Chief Justice Taney, as well as by the Supreme Court

of Pennsylvania in *Commonwealth v. Mann, supra*, operates upon the *power* to tax and not upon the *incidental means* employed to *collect*." (Italics ours.)

Indeed, upon grounds already stated, it cannot be that that mere succession of events can fairly be determinative of the question, for probably most "income taxes," as distinguished from "duties, imports and excises" as defined in *Pacific Insurance Co. v. Soule*, 7 Wall. 445, are made payable *after* the taxable year's income from all sources has been shown by the taxpayer's return. Then the taxation is laid upon the income thus ascertained, including in the case of a Judge, his compensation received as such. No person thus reporting his income can doubt its diminution when he pays the tax thereon.

Under the revenue act of July 1, 1862 (12 Stats. 472), income taxes on judicial salaries were attempted to be retained by the Treasury Department itself out of each installment paid. Here the taxation is not seized *in advance*, as was then done, but is exacted, *under threat of penalties*, within about two and a half months *after* the close of the taxable year. The Judge must either hoard enough to meet the demand to come in March of the next year for the taxes imposed on his salary paid in installments during the previous year or he must meet the de-

mand out of the next year's salary. The Constitution says nothing about *yearly* compensation, but requires that the compensation of a Judge shall not be reduced at all (meaning at any time or in any way) "*during his continuance in office.*"

There are, speaking generally, only two periods when the collection of income taxes imposed by law is possible—one being at the various times when the income is received, and the other being at a time after the whole taxable year's income has been ascertained. In either case, however, the tax is directly imposed upon *that* year's earnings, whether its collection is enforced as the income is received or within the short period fixed by law after the taxable year's income has been made to appear by the return. In either case, the taxation thereon equally and inexorably rests upon and diminishes the year's compensation. Any other conclusion would seem to be illogical if not somewhat strained.

Besides, the ATTORNEY GENERAL'S view ignores the fact we have mentioned, that payment of the taxes must be promptly provided for, year by year, out of the money received by the Judge "*during his continuance in office.*" No one contends, if any of a Judge's compensation *itself* earns other income, that the latter may not be taxed under the law, but the judicial "*compensation*" of the Judge "*as such*"

cannot be diminished by taxation imposed by Congress.

Furthermore, in the opinion of the ATTORNEY GENERAL it is stated that:

“The Revenue Act does not lay a tax on these incomes because of their source or in any discriminative way. The tax is laid on them just as it is laid on other income. *The tax is not laid on the salaries as such.* It does not necessarily *apply to the whole of the salaries received.*”

The statements we have italicized in the two last sentences appear to be made despite the very clear provisions of Sections 213 defining “gross income,” and which, though inserted at the outset, are copied again with some italics of our own, as follows:

“For the purposes of that title gross income includes gains, profits, and income derived from salaries, wages and compensation for personal services (including in the case of the President of the United States, *the judges of the supreme and inferior courts of the United States * * * the compensation received as such*) of whatever kind and in whatever form paid * * * and income derived from any source whatever. *The amount of all such items* shall be included in the gross income for the taxable year in which received by the taxpayer.”

We conclude there must have been misapprehension as to the italicized parts of the statute when the two sentences referred to were written by the ATTORNEY GENERAL.

We may, we think, fairly sum up the situation under Art. 3, Sec. 1, as it existed when this suit was brought, as follows:

There then appeared directly to favor Attorney General Palmer's views thereon:

1st. The discredited case of *Commissioners v. Chapman*, 2nd Rawle 73;

2nd. His own opinion of May 6, 1919, and

3rd. Possibly something in *State v. Nygaard*, 159 Wis. 396, though we have not been able to see what that something was.

Opposed thereto were three adjudicated cases and other authorities of great force, viz.:

1st. *New Orleans v. Lea*, 14 La. An. 194.

2nd. *Commonwealth v. Mann*, 5 Watts & Sergeant 403.

3rd. *Com. v. Mathues*, 210 Penn. 394.

4th. Attorney General Hoar's Opinion, 13 Opinions Atty. Gen. 161.

5th. That of the Attorney General of North Carolina, 131 N. C. 93.

6th. The Federalist No. 79.

7th. Story on the Constitution, Secs. 1629-30-31.

8th. 1st Kent's Commentaries, pp. 293-4-5, and

9th. The notable letter of CHIEF JUSTICE TANEY (157 U. S. Appendix), which, though thought by the present Attorney General (and accurately) to be

extrajudicial, was nevertheless expressed with characteristic clearness, accuracy and force.

We submit that these authorities establish beyond doubt the proposition that up to the year 1919 the recognized and established construction of Article 3, Section 1, of the CONSTITUTION was that taxation on judicial compensation diminished it. Nor have we much doubt that later executive action by revenue officials under legislation enacted between 1861 and 1867 remedied any wrong thereby done. Such action, if taken, itself involves a similar construction and a yielding to the views sustained by these authorities.

THE SIXTEENTH AMENDMENT.

In his opinion the ATTORNEY GENERAL said:

“The sections of the Constitution involved in an answer to your questions are: (1) Article 1, Section 8. ‘The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, * * *.’

“(2) The Sixteenth Amendment, which is as follows: ‘The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.’

“Under these provisions, it can not be doubted that Congress may levy an income tax on all incomes received from any source unless the broad power thus conferred is limited by some other provisions

of the Constitution. The only other provision which can, by any possibility, affect the right to include the salaries of the officials mentioned in their gross incomes for the purposes of taxation are the following, viz: Article 2, Section 1, forbidding the diminution of the President's salary, and Article 3, Section 1, forbidding the diminishing of judicial salaries."

And, he continues,

"The question is, whether these sections so limit those conferring the tax power that Congress is not only denied the right to directly diminish the compensation of these officials during their respective terms, but is also without power to so frame a general income tax law that the undiminished compensation so received shall be taken into consideration in determining the amount of tax they shall pay."

The ATTORNEY GENERAL further says:

"In the present inquiry, since the Sixteenth Amendment merely removed a restriction as to the manner of levying taxes on certain kinds of incomes, the inhibition against diminishing salaries and the authority to levy taxes on incomes must be regarded as contained in the same instrument. The question is whether there is such conflict between them as that the one must be regarded as a limitation upon the other."

Upon these statements and because without them his other conclusions would seem to have little or nothing to rest upon, there appears to be no doubt that in his opinion the 16th Amendment, which he copied and which in express terms gives Congress

the power to lay taxes on incomes from whatever source derived, is the one constitutional provision which removes all difficulty and authorizes the taxation imposed by the revenue Act on the compensation as such of the Judges, notwithstanding the provisions of Section 1 of Article 3 of the Constitution which otherwise would forbid it.

We had supposed the opposite conclusion was altogether inevitable from the decisions in *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 12, 27, and in *Peck & Co. v. Lowe, Collector*, 247 U. S. 165, and that further discussion on this phase of the case would hardly be necessary. But in view of what the ATTORNEY GENERAL has said, we shall go into the question at some length, especially, as in the debates while the Act was under consideration, there was a contention by some members of Congress to the effect that the taxation of judicial salaries has constitutional warrant in the 16TH AMENDMENT, which, it was contended, authorizes taxation upon incomes "from whatever source derived"; and if the adoption of that Amendment had no history, and if there were no other words in it, there possibly might be some force in the suggestion. It will be recalled, however, that practically equivalent language was used in what was our first income tax law, the Act approved August 5, 1861 (12 Stats. p. 309), in its suc-

cessor, the Act approved July 1, 1862 (12 Stats., p. 473, and in the Act approved March 2, 1867 (14 Stats., p. 478).

Article 1, Section 9, Clause 4, of the CONSTITUTION, reads as follows:

“No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken.”

This provision of the CONSTITUTION and a judicial inquiry (*Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, S. C. 158 U. S. 601) into the constitutionality of a statute which ignored it, furnished the occasion for the 16TH AMENDMENT; and the next question to be discussed is, Did that Amendment authorize income taxation on the compensation of the Federal Judges, notwithstanding that provision of Article 3, Section 1, of the CONSTITUTION which expressly prohibits any diminution thereof by any legislation enacted during a judge's continuance in office.

The determination of this question from this standpoint must be reached through the application of rules of interpretation established by decisions of this honorable Court and which have been so clearly and distinctly stated by it as to admit of no dispute.

In August, 1894, “*An Act to reduce taxation, to provide revenue for the Government, and for other purposes*,” (the Wilson Bill), became a law without

the approval of the President. Among other things it provided (28 Stats. 553) for certain forms of income taxation, namely, 1st, a tax on the rents or income from real estate, and, 2nd, a tax on income derived from interest received on bonds issued by municipal corporations, all without compliance with that clause of the CONSTITUTION which provides that "No capitation, or other direct Tax, shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken." (Art. 1, Sec. 9, Clause 4.)

The case of *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, was brought to test the constitutionality of those and other provisions of the Act. After most elaborate argument by counsel, and upon great consideration, the Supreme Court held that the Act, so far as it involved the validity of the income taxes above indicated, was unconstitutional upon the ground that they were direct taxes not laid in proportion to the census enumeration. This result, based upon that ground, created the entire situation which the 16TH AMENDMENT was designed to remedy, and led to the insertion therein of such words only as were required to so modify Clause 4, Section 9 of Article 1 of the CONSTITUTION as to meet that situation. That clause of the CONSTITUTION relates solely to capitation and direct taxes and *not* to

the wholly unrelated Article 3, Section 1, which established and provided for a totally *different* thing, namely, the protection and independence of the judiciary.

Indeed it seems well nigh impossible to say, or to suppose, that anything except the defect developed by the *Pollock* case, in Clause 4, Section 9 of Article 1 of the CONSTITUTION, was in the mind either (a) of Congress, or (b) of the Legislatures, or (c) of the people when they selected the Legislatures of the several States, and when the latter respectively considered the necessity for the 16TH AMENDMENT. And in view of actual historical facts, it manifestly would involve an immense strain on the probabilities to say that either Congress, or the people, or the Legislatures thereby intended to nullify that part of Article 3, Section 1, of the CONSTITUTION which, upon grounds of the greatest importance, forbids the diminution of the salaries of the judges during their continuance in office.

The wisdom—indeed, the necessity—of the latter clause had been urged and extolled in its making and ever since. In the preceding century and more no complaint of it had been agitated. The 16TH AMENDMENT was never intended to impair or destroy it, and especially not by such a “stealthy encroachment” upon it as would be involved in the supposi-

tion that the courts, despite all historic facts, are now REQUIRED TO MAKE ANY CONSTRUCTION WHICH WOULD NOT LEAVE BOTH THAT PROVISION AND THE 16TH AMENDMENT CO-EXISTENT AND IN FULL FORCE—THE LATTER OPERATING ENTIRELY OUTSIDE THE FORMER.

This view seems to be emphasized and made clear by the use in the Amendment of the explanatory and qualifying words, “without apportionment among the several States and without regard to any Census or Enumeration,” the presence of which feature in the CONSTITUTION and its absence from the legislation of 1894 being the sole basis of the decision in the *Pollock* case.

At last, the *intention* of the makers of the 16TH AMENDMENT is the important thing to be considered in construing it, and the historical facts to be referred to appear to be not only persuasive, but altogether conclusive that the Amendment was not intended to give permission to tax judicial salaries and thereby diminish them.

In this connection it may be well to insert one apposite paragraph from the opinion in the *Pollock* case, 157 U. S. at page 558, where it was said:

“The first question to be considered is whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution. * * * But in arriving at any conclusion upon this point, we are at liberty to refer to the historical circum-

stances attending the framing and adoption of the Constitution as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other."

Also another from the opinion of the Court in *Knowlton v. Moore*, 178 U. S. at page 95, where it was said:

"The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to correctly interpret its meaning. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 558."

And yet another from the Court's opinion in the *Debs* case, 158 U. S., where, at page 594, it said:

"We fully agree with counsel that 'it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts,' and we reaffirm the declaration made for the court by Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635, that 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.' "

Furthermore, in *Prout v. Starr*, 188 U. S., at pages 543-4, the Court strongly illustrated the situation now involved when it most distinctly said:

"The Constitution of the United States, with the

several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. * * *

“It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed.”

A narrative of the generic facts to which the foregoing principles are to be applied in this instance becomes most important.

Before proceeding with that narrative, however, it may somewhat illumine its lesson to bear in mind that Article 1 of the CONSTITUTION is the most elaborate of all. It creates the Legislative Department of the Government and largely defines and limits its powers. Section 9, Clause 4, of that Article said to Congress that “no capitation, or other direct tax, shall be laid, unless in proportion to the Census or Enumeration hereinbefore directed to be taken.”

Article 2 creates the Executive Department, and is, though elaborate, less so than Article 1.

Article 3 is quite brief, but its first section contains the provision which reads:

“The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.”

The difference between these provisions, and especially between those of Articles 1 and 3—one pertaining to the Legislative Department and its functions, the other to the Judicial Department and its stability—is very great, and while every provision of the CONSTITUTION is highly important, the objects of those two are about as far apart as possible. This circumstances may aid when considering how the historical facts about to be stated can properly affect the rules for construing the CONSTITUTION already cited from the decisions of the Supreme Court.

HISTORY OF THE SIXTEENTH AMENDMENT.

The *Pollock* case was decided on April 8, 1895, and there the matter rested until the beginning of the administration of President Taft in March, 1909. The situation was then such as to induce him to call a special session of the 61st Congress; and when it convened, there began consideration of the bill ultimately known as the Payne-Aldrich Tariff Bill, the discussions upon which developed that the decision in the *Pollock* case would prevent, in large measure, the enactment of efficient income tax legislation. Some desired to attempt by legislation to evade or disregard that decision, but wiser counsels prevailed. On June 16, 1909, the President sent to Congress a special message which was printed in full in

the Congressional Record (1st Sess., 61st Cong., 3344-3708), and also as Senate Document 98, 61st Congress. In that message the President said:

“The House of Representatives has adopted the suggestion and has provided in the bill it passed for the collection of such a tax. In the Senate the action of its Finance Committee and the course of the debate indicate that it may not agree to this provision, and it is now proposed to make up the deficit by the imposition of a general income tax, in form and substance of almost exactly the same character as that which in the case of *Pollock v. Farmers’ Loan and Trust Company* (157 U. S. 429) was held by the Supreme Court to be a direct tax, and therefore not within the power of the Federal Government to impose unless apportioned among the several States according to population. This new proposal, which I did not discuss in my inaugural address or in my message at the opening of the present session, makes it appropriate for me to submit to the Congress certain additional recommendations.

“The decision of the Supreme Court in the income-tax cases deprived the National Government of a power which, by reason of previous decisions of the court, it was generally supposed that Government had. It is undoubtedly a power the National Government ought to have. It might be indispensable to the nation’s life in great crises. Although I have not considered a constitutional amendment as necessary to the exercise of certain phases of this power, a mature consideration has satisfied me that an amendment is the only proper course for its establishment to its full extent. I therefore recommend to the Congress that both Houses, by a two-thirds

vote, shall propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the States in proportion to population.

“This course is much to be preferred to the one proposed of re-enacting a law once judicially declared to be unconstitutional. For the Congress to assume that the court will reverse itself, and to enact legislation on such an assumption, will not strengthen popular confidence in the stability of judicial construction of the Constitution. It is much wiser policy to accept the decision and remedy the defect by amendment in due and regular course.”

In June, 1909, a joint resolution proposing a 16TH AMENDMENT to the Constitution precisely in the form in which it was adopted by the States was reported to the Senate by the Finance Committee through Senator Aldrich, its chairman. The report was very brief and not reduced to writing. Senator Aldrich thereupon moved that the report be adopted unanimously by the Senate, but other Senators desired to couple with it another constitutional amendment on a different subject, and some debate followed upon the latter proposition rather than upon the first. However the proposition to couple another amendment was declared out of order, and on July 3, 1909, the joint resolution proposing the 16TH AMENDMENT for adoption by the States was unanimously agreed to by the Senate. (See Cong. Rec., 61st Cong., pp. 3900, 4108 to 4120.)

The joint resolution had been considered by the Ways and Means Committee of the House and its report was as follows:

“The Committee on Ways and Means, to whom was referred the resolution (S. J. Res. 40) proposing an amendment to the Constitution of the United States, having had the same under consideration, report it back to the House without amendment and recommend that the resolution do pass.”

On July 12 or 13, 1909, the House of Representatives by a nearly unanimous vote adopted the joint resolution after much debate. In neither House of Congress was the proposition considered to be sufficiently difficult to require consideration by its Judiciary Committee.

Neither in the President's message nor in the report either of the Senate or of the House committee by which the subject had been considered, nor in the debates in either House of Congress, had Article 3, Section 1, of the Constitution been alluded to. Article 1, Section 9, Clause 4, of the Constitution, and the *Pollock* case, which construed it, presented the whole difficulty to be remedied. From all these circumstances, we repeat, it is clear that at no time was anything in the contemplation either of the President, who recommended it, or of the Congress which proposed it, or of the States which adopted the 16TH AMENDMENT, except the necessity for remedying the

defect in Article 1, Section 9, disclosed by the decision in the *Pollock* case, namely, apportionment among the States upon the census. That being the sole object to be accomplished, the 16TH AMENDMENT devised the means to that end. And on its face it explains that to be the fact when the light of its history is thrown upon it.

And that this is the correct view was put beyond dispute by the decision of this Court in *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 12, 17. In that case CHIEF JUSTICE WHITE, in delivering the opinion of the court, said:

“This is the text of the Amendment:

“ ‘The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.’

“It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed in the light of the history which we have given and of the decision in the *Pollock* case and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn

for the purpose of doing away for the future with the principle upon which the *Pollock* case was decided, that is, of determining whether a tax on income was direct and not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment. From this in substance it indisputably arises, first, that all the contentions which we have previously noticed concerning the assumed limitations to be implied from the language of the Amendment as to the nature and character of the income taxes which it authorizes find no support in the text and are in irreconcilable conflict with the very purpose which the Amendment was adopted to accomplish."

And in *Peck & Co. v. Lowe, Collector*, 247 U. S. 165, 172-3, speaking through Mr. Justice VAN DEVANTER, this Court held that:

"The Sixteenth Amendment, although referred to in argument, has no real bearing, and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power to new or excepted subjects, but merely removes all occasion, which otherwise might exist, for an apportionment among the States of taxes laid on income, whether it be derived from one source or another. *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 17-19; *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 112-113."

This being the settled construction of the SIXTEENTH AMENDMENT, it stands before the court as though that construction were a part of the Amendment itself.

OPINION OF THE DISTRICT JUDGE.

Yielding to our contention, the learned trial Judge, in his opinion, very distinctly held that Article 3, Section 1, of the CONSTITUTION was not affected by the 16TH AMENDMENT because it had been determined by this Court that that Amendment did not "extend the power of taxation of incomes to subjects previously exempt, but only to remove the necessity for apportionment with reference to income taxes," citing *Brushaber v. Union Pacific R. R. Co.* and *Peck v. Lowe*.

Thus he disposed, in obedience to the ruling in those cases, of what we regarded as the principal contention in ATTORNEY GENERAL PALMER'S Opinion, and thus he certainly leaves the legislation now in contest without any express constitutional provision upon which to rest.

The trial judge, however, unreservedly yielded assent to the other proposition urged by the Attorney General in his opinion, where, as we have seen in an earlier discussion of it, a question was stated to be,

whether Congress is not only denied the right to directly diminish the compensation of the judges, but is also without power to so frame a general income tax law requiring that the undiminished compensation so received by them shall be taken into consideration in determining the amount of tax they should pay. The Attorney General further stated the present inquiry to be, whether since the 16TH AMENDMENT removed a restriction as to the manner of levying taxes on certain kinds of incomes the inhibition against diminishing salaries and the authority to levy taxes on incomes must be regarded as contained in the same instrument, and asks whether there is such conflict between them, as that one must be regarded as a burden upon the other. His opinion then, as we think rather casuistically, urged that while Congress may be denied the right to directly diminish the compensation of the judges, yet under the 16TH AMENDMENT it may indirectly accomplish the same result by imposing income taxation upon compensation which came to the judge undiminished. That is to say, he urged that, while Congress cannot, in so many words, diminish judicial compensation, it may indirectly accomplish that result under that Amendment by income taxation thereon payable in March after it had all been received before the end of the previous December. He seems to have

overlooked the fact that while *collection* of the tax had not been made, the tax in express terms had been *laid* on the income for the taxable year 1918. In fact, he evidently overlooked the opinion in *Cummings v. The State of Missouri*, 4 Wall. (71 U. S.) 277, wherein, on page 329, this Court said:

“The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure.”

If for the words “intended to secure the liberty of the citizen” used in this extract there should be substituted the words “intended to secure the independence of the judiciary,” we think it would be not only apposite but altogether as sound and controlling here as it was in the case then under hearing. Indeed we contend that it is a thoroughly sound proposition that Congress can not do indirectly what it cannot, under the Constitution, do directly.

While the learned trial Judge holds that the 16TH AMENDMENT cannot control, he nevertheless says in his opinion: that

“The constitutional provision referred to (Section 1 of Article 3) does not exempt the judges from taxation, generally speaking. They are subject to the taxing power equally with other citizens. In-

deed, their salaries, in so far as used to defray their living expenses, or otherwise consumed by them, have been laid under indirect taxation by duties, imposts and excises since the beginning of the government, and if the revenue now exacted by income tax has been raised by the familiar indirect means, the judicial salary would have been, without question, subject thereto in its expenditure, as in the past. Therefore, a tax is not invalid merely because it may operate indirectly or incidentally to require payment to the government of some part of the money paid out as judicial salary.

“Since the judge is, as others, subject to taxation, it may be stated that he owes the government his fair share of the burden which the United States is obliged to impose upon its citizens for its support. On the other hand, the government owes to him an undiminished compensation. But these are two independent accounts; neither may be justly said to impair the other.”

After certain argumentative propositions he then says:

“It seems, therefore, that the tax which the plaintiff now sues to recover is at most but an indirect or incidental burden upon judicial compensation resulting from a uniform and general income tax, and is therefore not a diminution of such compensation within the meaning of the Constitution.”

It may, we think, be fairly said of these views:

First, that no direct authority can be cited in their support.

Second, that probably for the first time it is judi-

cially found that when Congress cannot do a thing directly, it may nevertheless do it indirectly.

Third, that to some extent the opinion deals not with the limitations of the Constitution, and the great principles upon which those limitations are based, but rather with original propositions of public policy, which might have appealed to popular favor when not so profoundly considered as were the provisions of our fundamental law.

Fourth, that there is a well established proposition that a contemporaneous, long-continued and practical interpretation of the Constitution conformed to and acquiesced in for a great many years, conclusively fixes that construction. *Martin v. Hunter*, 1 Wheat. 304, 351-2, *Cohens v. Virginia*, 6 Wheat. 264, 418-19, *Prigg v. Pennsylvania*, 16 Pet. 621-2, *Levin v. United States*, 128 Fed. 628-9. It is, we believe, altogether accurate to say that though this Court has not adjudicated the question, the view has been well-nigh universally held during all our national existence that Art. 3, Sec. 1, absolutely prohibits the diminution of judicial compensation by any device whatever, and it may in this connection appropriately be added that in the great case of *Scott v. Sandford*, 19 How. at page 426, this Court, in speaking of the Constitution, said that: "As long as it continues to exist in its present form, it speaks

not only the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.”

Fifth, that the Attorney General's Opinion was the first instance in which a law officer of the Government gave advice such as is found in it.

Sixth, that if the propositions we now urge are unsound there has been neglect by the law officers of the United States for 130 years to point it out, and no State seems to have differed from it unless in rare instances by specific provision in their organic laws.

Seventh, if there be no reason why the few Federal judges should not pay taxes on their compensation, there is none which should prevent the Government from applying the same rule to the very great number of State officers who are exempt from all taxation, as we shall note further along; and,

Eighth, that our contention throughout will be that Art. 3, Sec. 1, was not based upon the view that Federal judges should not pay taxes, for they must, like everybody else, pay taxes upon their property and other income, but rests upon the profound and fundamental propositions so ably and thoroughly discussed by the great authorities we cite, and which announce conclusions never previously contested by any law

officer of the Government, though certain Treasury officials, anxious for large revenue, have occasionally urged a different view.

In the situation thus presented we submit that Article 3, Section 1, is entitled to much greater consideration than was given it in the court below, and it may be that the learned trial judge unconsciously overlooked the remark made by CHIEF JUSTICE MARSHALL in the great case of *Marbury v. Madison*, 1 Cranch, 178, and referred to in the opinion in *Pollock v. Farmers' Etc. Co.*, 157 U. S. 554, that the doctrine "that courts must close their eyes on the Constitution and see only the law would subvert the very foundation of written constitutions."

Article 3, Section 1, Must Control.

As has been suggested, Article 3 of the CONSTITUTION constitutes the foundation of our national judicial system. That has been so fully recognized that we can recall no effort in all our history (except those which failed in very recent Congresses) to interfere with its first section and override its tenure of office clause. This attempt failed largely because it was urged that:

"Article III, section 1, of the Constitution of the United States is in this language:

The judicial power of the United States shall be vested in one Supreme Court and in such inferior

courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.

Article I, section 3, provides that—

The Senate shall have the sole power to try impeachments * * * and no person shall be convicted without the concurrence of two-thirds of the Members present.

Article II, section 4, provides that—

The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for, and on conviction of, treason, bribery, or other high crimes and misdemeanors.

If these provisions mean anything it is that every judge of a court of the United States holds his office during good behavior and until, upon articles of impeachment duly presented, he has been convicted of treason, bribery or other high crime and misdemeanor, by a vote of two-thirds of the Senators present at the trial. And those constitutional provisions are of vital importance to the maintenance of that certainty of tenure, that independence of other departments of the Government, that exemption from the control of the passions and prejudices of the hour, and that freedom from the hunger and greed of official patronage which the farseeing framers of the Constitution thought were indispensable to the courageous discharge at all times of the great duties devolved upon them. It would be childish to contend that a judge, perfectly capable of performing all his duties efficiently, had com-

mitted treason or had been guilty of bribery or other crime or misdemeanor by having had the good fortune to reach the age of 70 years. That age as a test is, of course, purely arbitrary, and if the exigency of party greed or the demands of patronage or resentment at some judge who had offended some very influential member of one or the other House of Congress by ruling against him or his friend, should make it desirable, then the test of 60 years might be established, or 50. Or, indeed, any other test might be selected by Congress, for it is axiomatic that if the power exist there is usually no limit upon its exercise. The result might be that parties, as they succeed each other in governmental control, by one arbitrary test or another might crowd out the judges as they pleased, and thus utterly subvert all the constitutional restrictions to which we have referred. That this is no imaginary suggestion is shown by the legislation now to be considered, and which has characteristics that have led some of the newspaper press to call it a 'ripper bill'—a sort of bill not heretofore attempted upon the judiciary, and which, indeed, has features worse than the 'recall.'” (Senate Document 688, 64th Congress, 2nd Session.)

We submit that the propositions thus stated are quite as strong in an effort to save the clause forbidding diminution of judicial compensation as they were in the effort to save its companion clause respecting the tenure of judicial office, each of which stands upon the same basis in the estimation of all great writers upon the subject.

We believe it is certain that no Congress except the 65th ever attempted *in express terms* to override its other provision which forbids the diminution of judicial compensation. That was done by that Congress in the legislation now under consideration, and authority to do so was to some extent claimed under the 16TH AMENDMENT. However, from 1861 to 1867, successive Congresses, without, we think, mentioning the judges, did impose income taxation on the salaries of "all officers of the United States." Certain officials of the Treasury construed this to include the judges as coming within the description of officers of the United States. It was against one of the Acts thus construed that the letter of CHIEF JUSTICE TANEY was directed. Later there came the opinion of Attorney General Hoar, and we think it entirely clear that that legislation has not been enforced as respects judicial compensation during any part of the fifty years which have followed. The clear and convincing opinion of Attorney General Hoar put an end to it altogether.

It does not seem to have heretofore been necessary, in order to its settlement, that any judge should litigate the question. No Attorney General, except the present one, has ever upheld such legislation. He seems to have based its validity mainly upon the 16TH AMENDMENT, though one other ground of support for

the legislation is urged in his recent opinion. In this situation none but a judge could institute an action by which to raise the question, now, it is hoped, to be finally settled by this Court. Necessarily, undertaking this was not a pleasant nor an easy task, but we cannot doubt the importance of the constitutional question involved in plaintiff's claim. Would it not be wise and best to have an authoritative settlement of it? If so, this suit affords, for the first time, an opportunity for doing so.

It may aid in accomplishing the result thus sought, to point out that there are three provisions of the CONSTITUTION to be considered, namely, *first*, Article 3, Section 1, which, without qualification, *forbids* the diminution of the compensation of the judges during their continuance in office; *second*, Article 1, Section 8, Clause 1, which, in express terms, gives Congress the *power* to "lay and collect taxes," and, *third*, the 16TH AMENDMENT, the reach of which was definitely and positively settled in *Brushaber v. Union Pacific R. R. Co.* and *Peck v. Lowe*, and need not further concern us.

In *Martin v. Hunter*, 1 Wheat. 305, 333, the court, speaking through Mr. Justice Story, said:

"It will be found, that whenever a particular object is to be effected, the language of the Constitution is always imperative, and cannot be disregarded, without violating the first principles of public duty."

In *Dick v. United States*, 208 U. S., 340, 353, Mr. Justice Harlan, in delivering the opinion of the Court, construing two phases of the Constitution, said:

“These fundamental principles are of equal dignity and neither must be so enforced as to nullify or substantially impair the other.”

And, we repeat, in *Prout v. Starr*, 188 U. S., 541, *supra*, MR. JUSTICE SHIRAS, speaking for the court, said:

“It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed.”

The only way, therefore, to give effect alike to Article 1 and Article 3 is by recognizing the exception *necessarily implied in Article 3* to the general power given by Article 1. Certainly it seems clear as a general and well established proposition that the *taxing power* of Congress, as well as its other powers, is subject to other constitutional limitations, and must be considered with reference thereto. This interpretation is specially demanded here by the nature of the provisions to be construed, namely, one which *imperitatively prohibits* the diminution of judicial compensation, and another which gives Congress very

great and *discretionary power* upon the general subject of laying and collecting taxes.

The argument made by the present learned ATTORNEY GENERAL could be used either for the nullification or the great impairment of Section 1 of Article 3, and the suggestion is respectfully submitted, in view of the great purposes of that Section, that in interpreting it all doubts should be resolved in favor of a construction which would avoid that result and balk any attempt in that direction under the specious guise of taxation. Unless the fathers were mistaken in their estimate the constitutional principle embraced in Section 1, Article 3, is of far greater importance than all the revenue that could come from the statute, even if that Section could be regarded as one which could be bartered away for revenue only.

The decisions in *Brushaber v. Union Pacific R. R. Co.* and *Peck & Co. v. Lowe* seem to establish beyond all doubt the proposition that the question now under consideration cannot in any way be affected by the SIXTEENTH AMENDMENT. If this be correct, we repeat, the only matter to be determined is, Does Article 3, Section 1, properly construed forbid the imposition by Congress of income taxation on the compensation of the Judges in the absence of any other provision *expressly authorizing it*? The solution of that question depends upon whether that taxation di-

minishes the compensation, and we have endeavored to make it manifest that it does.

It is obvious, of course, that diminution was forbidden upon fundamental grounds. The power to impose Federal "taxation" (as distinguished from duties, imposts and excises) is not limited by any rule of uniformity. "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits." (*Weston v. Charleston*, 2 Peters, 466.) And certainly, as we have seen, such right involves the power to destroy that upon which the taxation is imposed—in *this instance judicial compensation*. The object of Section 1, Article 3 was to prevent any diminution of judicial independence or compensation by *any sort of Congressional action* which would tend to work either result. That objective was based upon the ideas, *first*, that its independence was an essential element of the efficiency of the judiciary, and, *second*, that it was otherwise possible in times of great turmoil or extraordinary excitement (which may not at any time be far off) for legislation to take hues therefrom, and there being no limits to the power (if it exist at all) to tax judicial compensation, legislation may go to any length.

If the power to "lay and collect taxes" is not hampered by the restriction provided by Article 3, Section 1, of the CONSTITUTION, and there *being no pro-*

vision forbidding classification nor any requiring uniformity (see *Citizens Telephone Co. v. Fuller*, 229 U. S. 322) unbearable burdens might be imposed upon temporarily unpopular judges who might, in their circuits or districts, have gone counter to that excitement or its possibly destructive demands. It was to prevent such legislation as well as other possibilities that Section 1 of Article 3 without qualification forbade the diminution of judicial compensation, and made no exception permitting it by taxation.

One question decided in *Pollock v. Farmers' Loan and Trust Co.* was that a tax on the income derived from rents on land was a direct tax on the land itself (just as the income tax here is directly upon judicial compensation), and in the course of the opinion illustrative propositions were stated by the court as follows (p. 581):

“If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions can not be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown v. Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of

an importer was the same as tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston v. Charleston*, 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible."

It would seem that the logic of these propositions would inevitably lead to the conclusion that the constitutional provision forbidding the diminution of judicial salaries cannot be evaded by formally calling the diminution "taxation," especially as the power to tax, if it exist at all, could as legally and constitutionally put on judicial compensation the somewhat ruinous rate (to say the least of it) of 99% as that of 6% fixed in the revenue Act of February 24, 1919. Would a tax of 99% put on that compensation as such diminish it in fact, even if not in form? If the 99% rate would be an invasion or a violation of the CONSTITUTION, so would be the 6% rate, the difference being only in the degree of diminution accomplished. One diminution, though more palpable, would not be more certain than the other.

Nor would it be more certain if the act, in express terms, lowered the salaries to be paid and called the process "taxation." The legislation involved in this case, whether or not it was so intended, has, in fact, ignored Section 1 of Article 3 of the CONSTITUTION, *or else has erroneously considered it as, in part, repealed by the 16TH AMENDMENT.*

This situation may fairly be regarded as logically equivalent to an attempt by Congress to do indirectly what it could not do directly. That constitutional provision which forbids the diminution of judicial compensation can not, we submit, be evaded, disregarded or set at naught in that way, and the opinion of this Court in *Minnesota v. Barber*, 136 U. S. 316, though State legislation only was then directly involved, has greatly more than an incidental bearing on the questions now to be determined, and especially have those parts of it which we take from pages 319 and 320 of the report where Mr. Justice HARLAN, speaking for the court, said:

"The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary

operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court. In *Henderson &c v. New York &c.*, 92 U.S. 259, 268, where a Statute of New York imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the court said that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' In *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 63, where the question was as to the validity of a statute of the same State, which was attempted to be supported as an inspection law authorized by section 10 of article 1 of the Constitution, and was so designated in its title, it was said: 'A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title.' So, in *Soon Hing v. Crowley*, 113 U. S. 703, 710: 'The rule is general, with reference to the enactments of all legislative bodies, that the courts can not inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the facts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows

as the natural and reasonable effect of their enactments.' In *Mugler v. Kansas*, 123 U. S. 623, 661, the court, after observing that every possible presumption is to be indulged in favor of the validity of the statute, said that the judiciary must obey the Constitution rather than the law making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed."

These great principles of constitutional interpretation seem to be quite as impressive and controlling here as they were in the case then determined.

Attack on Independence of Judicial Department.

One of the fundamental bases upon which the security of our constitutional government rests is that there are three separate departments thereof, each indispensable to good government, namely, the Legislative, the Executive and the Judicial. The CONSTITUTION sought to make this proposition entirely clear, and no one nor any two of those departments is given power to destroy, to starve out, to paralyze or impair the efficiency of the third. This must of necessity be true. Within limitations fixed by the CONSTITUTION each of these departments, while it co-operates with the others for the public good, is nevertheless independent of them—each being supreme in its own sphere. The sphere of the Legislative department is wide, its potency immensely great. The

sphere of the Executive department, always great, at times appears to be well nigh overwhelming. The not less indispensable sphere of the Judicial department is much less conspicuous in its operations. It is made up of not over 170 individual judges—an average possibly of one person to every 650,000 of the population. The vigor and effective power of this numerically weak department of the government to perform the great functions for which it was designed, has been found, *first*, in the usually cordial co-operation with it of the other departments of the government, and, *second*, in the patriotic respect the people of our country have cherished for the organic law of the Nation.

While certainly not so intended either by the Legislative department which enacted it or by the Executive department which approved it, the legislation now in question appears, nevertheless, to be an attack upon the Judicial department of the government, though that attack may be upon its mere outposts. Though not so intended, it might be given the appearance of a subtle design to affect the independence of a co-ordinate department of the government, and if not repulsed the attack might undermine or greatly impair the safeguards provided by Article 3, Section 1, of the CONSTITUTION.

When we recall and consider the history of the

judiciary of the United States, can we believe the judicial department deserved the attack, if such it was? Fortunately there is a way to test whether the attack was warranted, and we cannot doubt there will be a vindication of the CONSTITUTION whether our contentions in this case are upheld or overruled.

Each department of the government should respect its limitations, and not trench upon those of another. If any departure from this rule ever occurs it is rarely if ever otherwise than from misconception, and then it is the necessary duty of the courts to correct the error if appealed to. Many times, indeed in most instances, this duty is not an agreeable one. In the instance here involved it is claimed that Congress misconstrued the CONSTITUTION, and that despite its explicit provision to the contrary has diminished the compensation of the Judges, by a statute enacted while those Judges were in office, and by then imposing and collecting taxation on that *compensation received as such* for the taxable year in which it was paid.

In view of the great and cogent reasons already shown to have been the basis of the prohibition found in Article 3, Section 1 of the CONSTITUTION, if the disregard of that prohibitive clause is not questioned, it is possible (even if improbable) for others to follow, a taxation that would terrorize or destroy might be

invented, and the undermining of the independence of the judiciary might begin. In view of this possibility, resistance to this encroachment on the CONSTITUTION is not an unpatriotic service.

In short, the framers of the CONSTITUTION believed, first, that the judicial department of the government thereby created was equally as necessary as either of the other two—each of the three being indeed absolutely essential; second, that its independence of the other two should be guarded and especially protected because it was the weakest in number and power, and, therefore, third, it was safeguarded and protected in its independence by those provisions which make permanent the tenure in office of the judges and forbid any diminishing of their compensation during their continuance therein.

As has been abundantly shown, these were the reasons upon which the clause we are discussing was put into the organic law by the thoughtful men who constructed it. Clearly it was not constructed upon the petty thought that judicial salaries should merely escape taxation, but upon the far broader and more statesmanlike grounds urged in the Federalist, and afterwards approved by the public policy of most if not all of the States, as now manifestly shown in their own constitutions.

The 16TH AMENDMENT, as we have shown, was in

no way designed to impair or to interfere with this fundamental purpose, nor, we submit, should the views expressed by the trial judge have greater effect.

It was established at an early date that the salaries of officers of the United States could not be taxed by the States. (*Dobbins v. Commissioners*, 16 Pet. 435.) On the other hand, it was clearly settled in *The Collector v. Day*, 11 Wall. 113, 127, that the United States could not impose taxation upon the salaries of any of the judicial or other officers of the several States, and on page 127 of the report, it was said:

“But we are referred to the *Veazie Bank v. Fenno*, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch v. Maryland*, namely, ‘that the power of taxation involves the power to destroy.’” 8 Wall. 533.

The officers of all the States combined would probably exceed 60,000 in number—over 350 times as many as make up the entire body of the Federal Judiciary. The decision of this Court in *Collector v. Day* saves the rights of each and all of these State officers by the ruling that their compensation is entirely exempt from Federal taxation in any form. This exemption, though no provision in express terms mentions it, was established upon sound principles of constitutional interpretation, and

Congress in no way attempted in the revenue Act approved February 24, 1919, to disregard that decision of this Court, though, in that Act, it is submitted, Congress did ignore the explicit prohibition of the higher authority, viz., Section 1 of Article 3 of the CONSTITUTION itself, when it diminished by income taxation the compensation of all those who make up the Federal Judiciary. The power to tax involving a power to destroy, as this honorable Court has pointed out, that result is one which the CONSTITUTION intended to guard against in that limitation upon Congressional power.

But these more general observations apart, we come back to the contention that the laying of income taxation on the compensation of the Federal judges by the Act of February 24, 1919, though not so intended, is nevertheless an insidious encroachment upon their constitutional rights which might be made the beginning of an attack upon the independence of the judicial department of the government. Such "stealthy encroachments" (*Debbs* case, 158 U. S. 594) ought to be resisted, and upon the grounds hereinabove indicated that resistance should meet the approval of all thoughtful citizens, an unusual number of whom have recently taken the oath to support and defend that Constitution, one provision of which has been disregarded in the respect we have pointed

out. Many of our citizens, indeed, at one time or another, have offered life itself in that behalf, and it can hardly be doubted that resistance to such encroachment is as patriotic as is sensitive acquiescence. While acquiescence on some occasions might be harmless, in others it might leave an opening for great evils. The resister in this instance is not actuated by any sordid expectation of pecuniary advantage, as at his age of 77 he will probably be the loser in any event as expense accounts may show, but he will have vindicated his sense of devotion early acquired and firmly cherished to that CONSTITUTION he has long most unfeignedly revered and to maintain which in his early life he made the solemn vow to support and defend it.

We most respectfully submit that the judgment of the Court below was erroneous and should be reversed.

WALTER EVANS,
Pro se.

FRANK P. STRAUS,
HOWARD B. LEE,
WM. MARSHALL BULLITT,
EDMUND F. TRABUE,
HELM BRUCE,
Of Counsel.

January 17, 1920.

No. 654.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

WALTER EVANS, PLAINTIFF IN ERROR,

v.

J. ROGERS GORE, DEFENDANT IN ERROR.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF KENTUCKY.*

BRIEF FOR DEFENDANT IN ERROR.

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*IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF KENTUCKY.*

BRIEF FOR DEFENDANT IN ERROR.

This case is here on writ of error to review a judgment of the District Court dismissing a petition filed to recover taxes paid under protest.

THE CASE.

The plaintiff in error is a United States District Judge. The revenue act of 1918, 40 Stat., c. 18, 1057, 1065, imposes certain taxes upon individuals, the tax to be based upon net income determined by making certain deductions from the gross income. Section 213 provides that gross income—

Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of

the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Pursuant to this statute, the plaintiff in error included in his return for the year 1918 the salary which he had received as a district judge of the United States. He conceived, however, that the requirement that this salary be included in his gross income, and therefore considered in determining the amount of income tax for which he was liable, was contrary to Article III, section 1, of the Constitution of the United States, which provides that—

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

He therefore paid, under protest, the tax the amount of which had been determined by thus

including his salary as a judge; and, having taken all the steps necessary to entitle him to sue, commenced this suit to recover the amount in excess of what he would have paid if his salary had not been included in his gross income. The case was heard on demurrer, and District Judge Peck, holding the act in question to be constitutional and valid, sustained the demurrer and dismissed the suit.

QUESTION INVOLVED.

The sole question in the case is, whether the provision of the 'Constitution' against the diminution of the compensation of a judge during his continuance in office forbids Congress, in levying a general tax upon incomes, to require his salary to be included as a part of his income for the purposes of taxation.

THE GOVERNMENT'S CONTENTION.

The Government contends that the revenue act in question can not be said, in any constitutional sense, to diminish the salary of a judge; that the Constitution guarantees to every judge that, during the period of his service, he shall be paid a salary which shall, at no time, be less than when he takes the oath of office; that a judge while in office remains also a citizen and is subject to the ordinary obligations which every citizen owes to his Government; that the Constitution does not relieve him of any of these obligations; that, by the provision against diminishing his salary, he is guaranteed during his entire time of service at least a fixed sum of money for the maintenance of himself

and his family and the discharge of all obligations resting upon him, including the ordinary obligations of a citizen to his Government; that there is no guarantee that the fixed sum received by him shall continue to have the same purchasing power or that his obligations to the Government shall remain unchanged or be less than those of any other citizen similarly situated; and that when Congress, after determining that the needs of the Government required from all its citizens contributions in proportion to their incomes, enacted that all citizens enjoying incomes of a certain amount should pay in taxes a certain sum, there is no constitutional inhibition against including a judge in the class with all other persons possessed of the same income and requiring him to pay the same income tax.

**LEGISLATION ON THIS SUBJECT SINCE THE ADOPTION
OF THE SIXTEENTH AMENDMENT.**

The prevailing system of income taxes in the United States began with the adoption of the sixteenth amendment. It is not, in view of recent decisions, contended that this amendment rendered taxable as income anything which was not so taxable before. Congress already had ample power to tax income regardless of the source from which derived; but income derived from certain sources was not taxable without apportionment among the States. The sixteenth amendment merely removed this restriction and placed it in the power of Congress to tax, without apportionment, income of all kinds. Except to

this extent, then, the act in question does not rest, for its validity, upon the sixteenth amendment.

The course of legislation which has resulted in the act now involved has been gradual. In the earlier acts, Congress saw fit to exempt the salaries of the judges then in office. Thus, in the act of 1913 (38 Stat., c. 16, pp. 166-180) it was provided that in computing net income there should be excluded—

the compensation of the present President of the United States during the term for which he has been elected, and of the judges of the supreme and inferior courts of the United States now in office, and the compensation of all officers and employees of a State or any political subdivision thereof except when such compensation is paid by the United States Government (p. 168).

This same provision was carried into the acts of 1916 and 1917. The act of 1917 went further. It levied upon the income of every corporation, partnership, or individual a tax called the "War Excess Profits Tax," but provided that this tax should not include—

In the case of officers and employees under the United States, or any State, Territory, or the District of Columbia, or any local subdivision thereof, the compensation or fees received by them as such officers or employees. (40 Stat., c. 63, p. 303.)

It will be noted that in these earlier acts, except in the case of the war excess profits tax, the only exemption to officers of the United States applied to the

President and the judges then in office. Article II, section 1, of the Constitution provides that the compensation of the President shall neither be increased nor diminished during the period for which he shall have been elected. Since, therefore, Congress provided for exemptions only in the case of those Federal officials whose salaries were protected by the Constitution against diminution, it is doubtless true that these exemptions were provided because Congress then took the view that not to allow the exemptions would be contrary to the provisions of the Constitution against diminishing salaries.

In enacting the act of 1918, however, Congress had evidently come to the conclusion that the Constitution did not require these exemptions, and therefore it required the salaries of these officials to be included in their taxable incomes.

BRIEF.

NO DECISION BY ANY FEDERAL COURT HOLDING THAT SUCH EXEMPTIONS ARE REQUIRED.

No Federal court has ever held that the constitutional provision against diminishing salaries of judges operates to prevent these salaries from being treated as a part of the taxable income of the judges. It is true that, when the act of 1913 was passed, there was a more or less general idea prevailing that such was the effect of the Constitution. This was largely due to the fact that, in 1863, Chief Justice Taney addressed a letter to Hon. Salmon P. Chase, then Secretary of the Treasury, asserting the unconstitutionality of an act

requiring income tax to be deducted from the salaries of judges. No notice appears to have been taken of this letter, and later it was ordered to be entered on the records of the court. 157 U. S., p. 701. There has been no discussion of the question, however, in any opinion delivered by any of the justices of this court except the concurring opinion of Mr. Justice Field in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429, 605-606. In this opinion, the learned justice referred to the letter of Chief Justice Taney and to an opinion of Attorney General Hoar, rendered in 1869, to the same effect, and himself expressed the same views. These views he urged as furnishing additional grounds for holding the income tax, then under consideration, invalid. This point, however, does not seem to have been made in the argument of the case, and the opinion of the court was based upon entirely different grounds, making no reference to this question.

Although the views of Chief Justice Taney and Mr. Justice Field on a question of this kind are always entitled to great weight, their views were in this instance expressed extrajudicially and can not be regarded as a judicial determination of the question. The action of Congress in thus, at first, exempting these salaries was also doubtless controlled to some extent by the opinion of Attorney General Hoar, in 1869, holding that an income tax could not be lawfully imposed on the salary of the President or any judge in office at the time the statute was passed. 13 Op. A. G., 161.

**CASES HOLDING THAT NEITHER THE STATE NOR THE
FEDERAL GOVERNMENT CAN TAX SALARIES OF THE
OFFICIALS OF THE OTHER NOT IN POINT.**

It is now settled that the United States can not tax the salaries of State officials and that the State governments can not tax those of Federal officials. *Dobbins v. Commissioners of Erie County*, 16 Pet. 434; *The Collector v. Day*, 11 Wall. 113. These cases followed *McCulloch v. Maryland*, 4 Wheat. 432, in which it was held that the Constitution prohibited taxation by the States of the means or instrumentalities of the General Government. In *The Collector v. Day*, *supra*, reference was made to *Dobbins v. The Commissioners of Erie County*, *supra*, and it was said:

The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt. *Id.*, p. 122-123.

The holding in these cases, therefore, was simply that the one Government could not tax the means or instrumentalities of the other. This principle, of course, can have no application in the present case. Unless prohibited by some constitutional provision,

a government may tax its own officers as it sees fit. This is not denied, and the plaintiff in error bases his claim to exemption solely and alone upon the constitutional provision above quoted.

DECISIONS OF STATE COURTS UNDER SIMILAR CONSTITUTIONAL PROVISION.

The constitutions of nearly all, if not all, the States contain provisions against diminishing official salaries more or less similar to that quoted above from the Federal Constitution. But few cases, however, seem to have arisen under these provisions.

In the case of *City of New Orleans v. Lea*, 14 La. Ann. 197, the statement of the case is very meager. The exact nature of the tax in question is not disclosed and all that appears is that the question in the case is "whether the city of New Orleans has the right, under the Constitution, to tax the salary of a justice of the supreme court of the State." The court, basing its decision on *McCulloch v. Maryland*, 4 Wheat. 316, and asserting that the power to tax involves the power to destroy, reached the conclusion that the legislature had no power to tax such salaries, in view of the constitutional inhibition against diminishing the salaries of judges during their continuance in office, and, not having such power itself, could not confer it upon the city of New Orleans.

In North Carolina, two attorneys general, rendering opinions at the request of the chief justice of the State, have held that the provision protecting the salaries of judges against diminution prevented the levying of a

tax upon such salaries, and, as to one of these opinions, it was said that it was approved by the court. 131 N. C. 693. And in 1871 the supreme court of that State, in the case of *King v. Hunter*, 65 N. C. 603, 613, in the course of a discussion as to the power of the legislature to take away from the sheriff a part of his powers and emoluments and confer them upon a tax collector, referred to the constitutional provision against diminishing the salaries of judges and said: "This is understood to exempt their salaries from taxation, because to tax is to diminish or, it may be, to destroy."

It can scarcely be said, however, that the question has been judicially determined in North Carolina. The judges were merely considering for themselves the question as to whether they should pay a tax and asked the attorney general for his advice.

How far these opinions in Louisiana and North Carolina were controlled by the nature of the tax under consideration—that is, whether there is any distinction between a general revenue law applying to all individuals alike and a law which singles out and discriminates against persons whose salaries are protected by the constitution—it is impossible to tell.

The question was considered in 1915, in Wisconsin, in the case of *State ex rel. Wickham v. Nygaard*, 150 Northwestern Reporter 513. The constitution of Wisconsin provided that—

Nor shall the compensation of any public officer be increased or diminished during his term of office.

It also contained a provision that—

The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe.

The income-tax law subsequently passed was levied, among other things, on "all wages, salaries, or fees derived from service." The legislature, however, seems to have had some doubt as to its right to tax the salaries of public officers, and hence attached a proviso to the effect that the act should not apply to such salaries if to tax them would be repugnant to the Constitution. One of the judges of the State contested the liability of his salary for the tax. The argument in support of his contention was stated by the court as follows:

Briefly stated, the position of the relator, in reference to the above-quoted constitutional provision, is this: If the State gives a salary with one hand and takes part of it away with the other, it diminishes the salary to the extent of the part taken, no matter under what pretense it is taken. The State may, if it sees fit, collect its entire revenue from a tax on incomes, and thus take away a large portion of the salary which it pays its officers. The power to tax involves the power to destroy (*McCulloch v. Maryland*, 4 Wheat. 316, 441, 4 L. Ed. 579), and, if a State may evade the constitutional provision referred to by using the taxing power, the safeguard provided has little force or vitality.

Speaking of the constitutional inhibition against diminishing salaries and the provision conferring the right to impose taxes on incomes, the court said:

Both constitutional provisions are somewhat general in their nature. As applied to the right to tax incomes of State officers, section 26 of article 4 is no more specific than is the amendment of 1908. Hardly as much so. The latter says that taxes may be "imposed on incomes." We are not at liberty to rewrite this clause so as to read that taxes may be "imposed on incomes, except where the income consists of a salary received by a public officer." We perceive very little room for construction, and, if a doubtful question were involved, it should not be resolved against the exercise of the taxing power by the State.

It was accordingly held that the relator was liable for the tax. It is true the provision against diminishing salaries was in the original constitution and the authority to impose income taxes was in an amendment adopted later, and the court said that if there was any conflict between the two provisions the later would be regarded as amending the earlier. For this reason it would perhaps scarcely be fair to claim that the Wisconsin court squarely decided the question now involved. In the present inquiry the inhibition against diminishing salaries and the authority to levy taxes on incomes are contained in the same instrument. The question is whether there is such conflict between them as that one must be regarded as a limitation upon the other.

The opinions just referred to—some of them because not judicial decisions, and the others because containing such a meager statement of the case—throw but little light on the proper decision of the question now involved. The best discussion to be found of these questions is in the Pennsylvania cases.

In *Commissioners v. Chapman*, 2 Rawle (Pa.) 73, the statute involved dealt with county rates and levies, and, in enumerating the subjects of taxation, included "all offices and posts of profit." A judge of one of the inferior courts resisted the payment of a tax levied by the county commissioners and invoked a provision of the constitution that the compensation of judges "shall not be diminished during their continuance in office." The court held against this contention, Judge Gibson saying:

Taxes are assessed for county purposes under the authority of the legislature, which is undoubtedly incompetent to reduce the defendant's salary. But as the constitution, like every other instrument, is to have a reasonable interpretation, the prohibition in question is to be restrained to laws which have such a reduction for their object and not for their consequence. On any other principle of construction a tax could not be constitutionally assessed on property purchased with money drawn from a judge's salary, which would, in reason, have as fair a claim to exemption as the salary itself. If we once get away from the plain inartificial import of the prohibition, it is not easy to foretell at what stage of refinement we shall stop. The object of the legis-

lature was to apportion the public burden according to the ratio of property, and to produce in detail a result approaching as near as possible to that of an income tax—a measure of assessment more equitable in the abstract than any other that could be proposed. Now, there is no reason to exempt a judge from contribution, which is not just as applicable to any other officer who presents no tangible surface but his office, to the revenue laws; nor was the object of the prohibition to place him in this respect on higher ground. The legislature could not constitutionally retrench a part of a judge's salary under the pretext of assessing a tax on it; but, for the *bona fide* purpose of contribution, a reasonable portion of it, like any other part of his property, may be applied to the public exigencies (p. 77).

The true test is well illustrated by comparing the case just quoted from with another Pennsylvania case. The above case was decided in 1829. The same constitutional question was raised before the court again in 1843, in *Commonwealth v. Mann*, 5 Watts & Sergeant's (Pa.) Reports, 403. The exact nature of the tax then involved is not explained, but it appears that the effect was to annually assess a tax upon salaries and emoluments of offices created by or held under the laws of the State, and this tax was required to be retained out of the salaries. The court held the act to be unconstitutional, saying:

Twist and turn it as you may, it is in vain to disguise the fact that in this attempt there is a plain and palpable infringement of our constitutional charter (p. 417).

The earlier case of *Commissioners v. Chapman* was not referred to, but the principle that the salaries of such officers may lawfully be included in the income upon which they are to pay a general income tax seems to have been clearly recognized, for the court said:

It may be asked, has not the legislature full power to tax her citizens? To this we answer, that is not denied. Taxation is an incident of sovereign power which acknowledges no limits except the discretion of those who use it, unless it be those objects of taxation which for wise reasons have been withdrawn from these general powers. The property of a judge, his income, whether derived from this or any other source, we admit is a proper subject of taxation. His security will then consist in being placed on the same footing with other citizens, and an abuse of them by any will be speedily corrected. Of this the relator does not complain; but he does complain that he, with others, is selected as a special object of taxation, contrary to the charter which he has solemnly sworn to support.

His honor, Judge Peck, in the court below, speaking of these two cases said:

There is nothing irreconcilable in these two decisions. The one condemning a special tax on salaries admits the propriety of a general tax on incomes, including the judicial salary; the other upholds the latter form of taxation. The distinction between these two cases would seem to define clearly the boundary line be-

tween diminution of salary by special taxation and the taxing of incomes generally, including such salaries. (Rec. p. 20.)

THE PRINCIPLE CONTROLLING THIS CASE HAS BEEN CLEARLY SETTLED BY DECISIONS OF THIS COURT IN CASES INVOLVING SIMILAR QUESTIONS.

While this court has not heretofore had occasion to construe the constitutional provision against diminishing salaries, it has, in cases involving the relation of other constitutional provisions to the taxing power, clearly established a principle or rule which controls this case.

Under the interstate-commerce clause of the Constitution, the power to regulate interstate commerce lies exclusively with Congress and beyond the control of the States. It has always been held that the State may not directly burden interstate commerce, either by taxation or otherwise. And every effort of the States to lay a tax on the transportation of the subjects of interstate commerce, or on the receipts derived from them, or on the occupation or business of carrying on interstate commerce, has been condemned. It has, at the same time, however, just as uniformly been held that a tax which only indirectly affects the profits or returns from such commerce is not within the rule. For this reason, it has been held that an individual or corporation engaged in interstate commerce is not exempt from ordinary property taxes upon property within the State, although employed in interstate commerce, and that the franchise of a corporation so engaged is a part of

its property and subject to taxation. *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 695, 696; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163. The prohibition against the levying by the States of a tax upon interstate commerce is just as clearly established as is the prohibition against diminishing the salaries of judges. Quite recently, however, this court had before it the question whether a State, in laying a general income tax upon gains and profits, may include in the computation the net income derived from transactions in interstate commerce. Certainly, it can not be claimed that including the salary of a judge in his taxable income, under a general law, is any more a diminishing of his salary than the including in the taxable income of a corporation profits derived from business in interstate commerce is a tax upon interstate commerce. The court, however, after referring to the state of the law, as indicated by the cases above cited, said:

Yet it is obvious that taxes imposed upon property or franchises employed in interstate commerce must be paid from the net returns of such commerce, and diminish them in the same sense that they are diminished by a tax imposed upon the net returns themselves. (*United States Glue Co. v. Oak Creek*, 247 U. S. 321, 327.)

And, after discussing the difference between direct and indirect burdens, and between a tax upon gross receipts and one upon net income, the court, speaking of a tax upon net profits, said:

Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States. (Id. 329.)

In the same case the court said:

The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, we held that a State tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to sections 8 and 10 of Article I of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received. On the other hand, in *Peck & Co. v. Lowe*, ante, 165, we held that the Income Tax Act of October 3, 1913, c. 16, section 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of

which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. 1, section 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden. (Id. 328.)

It was accordingly held that the State of Wisconsin could include in the taxable income of a corporation net profits derived from interstate commerce.

The case of *Peck & Co. v. Lowe*, 247 U. S. 165, is even more strikingly in point. That case involved the question whether net income derived from the business of exporting goods was taxable under the Federal income-tax act. It is not claimed that there is any express prohibition against including a judge's salary in his taxable income. The only claim is that this prohibition is necessarily implied in the provision against diminishing salaries. On the other hand, one of the few express restrictions upon the power to lay taxes, imposts, and excises is that "no tax or duty shall be laid on articles exported from any State." It had previously been held that this

provision qualified and restricted the taxing power to the extent of excepting from its operation articles in the course of transportation, the act or occupation of exporting, bills of lading for articles being exported, charter parties for the carriage of cargoes from State to foreign ports, and policies of marine insurance on articles being exported. *Turpin v. Burgess*, 117 U. S. 504, 507; *Brown v. Maryland*, 12 Wheat. 419, 445; *Fairbank v. United States*, 181 U. S. 283; *United States v. Hvoslef*, 237 U. S. 1; *Thames & Mersey Insurance Co. v. United States*, 237 U. S. 19. In short, this court had interpreted the latter provision as meaning that exportation must be free from taxation, and therefore required "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which *directly* burdens the exportation." *Fairbank v. United States*, *supra*, p. 293. Certainly, it can not be said that a more sweeping exemption can be implied from the inhibition against diminishing salaries than is found in the now thoroughly established rule of freedom from any tax which directly burdens exportation. The court, however, adhering to but distinguishing the cases above cited said:

The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And

while it can not be applied to any income which Congress has no power to tax (see *Stanton v. Baltic Mining Co.*, *supra*, p. 113) it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or accruing from all sources." There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation. (*Peck & Co. v. Lowe*, 247 U. S., p. 165, 174.)

If it can be said that a State may levy a tax upon a net income including profits derived from interstate commerce without imposing unconstitutional burdens upon interstate commerce, and if the Federal

Government may make a general income tax applicable to a net income including the profits derived from exports without violating the inhibition against taxing exports, it is difficult to see how it can be said that including the salary of a judge in his taxable income is, in any constitutional sense, a diminution of his salary.

**THE MERE FACT THAT A PART OF A JUDGE'S SALARY
MUST BE USED TO PAY A TAX DOES NOT RENDER THE
TAX UNCONSTITUTIONAL.**

The real theory of the plaintiff in error seems to be that if a part of the compensation which the Government pays to a judge with one hand is taken back by the same Government with another hand in the form of taxes, his compensation has been diminished within the meaning of the Constitution. But a judge's salary is paid to furnish him the means of supporting himself and family and meeting the obligations of citizenship. There has never been a time when a part of this salary did not, at least indirectly, find its way back into the Treasury of the United States as taxes. The learned judge below said:

Indeed, their salaries, in so far as used to defray their living expenses, or otherwise consumed by them, have been laid under indirect taxation by duties, imposts, and excises since the beginning of the Government, and if the revenue now exacted by income tax had been raised by the familiar indirect means, the judicial salary would have been, without question, subject thereto in its ex-

penditure as in the past. Therefore, a tax is not invalid merely because it may operate indirectly or incidentally to require repayment to the Government of some part of the money paid out as judicial salary. (Rec. pp. 15-16.)

It may be added that, at least during the period of the war, hundreds of articles of household and personal necessity were subject to special taxes. A judge could purchase none of these articles without being directly assessed for the amount of the tax. In this way, through his daily transactions, a part of his salary went back into the Treasury as taxes. No one, of course, would contend for a moment that a tariff law was invalid because to the extent of the taxes which a judge must pay under it his salary was diminished. Nor would it be contended that the special taxes collected from purchasers of most of the necessities of life during the war could not be properly collected in the case of purchases made by a judge. And yet there is no more direct diminution of his salary when, in common with all other citizens, he pays a general income tax than when he pays tariff or excise taxes on the articles he must buy in order to live.

Moreover, when a judge receives his salary it becomes his property. If he invests a part of it in real estate or other tangible property, such property is subject not only to Federal but also to State taxation. If he neither expends nor invests all of his salary, but allows it to accumulate in cash, it can not be doubted that this cash is, in like manner, taxable as personal property.

A case much relied on by plaintiff in error is *Commonwealth v. Mann*, 5 Watts & Sergeant's Reports, 403. But, as we have seen, the court said in that case—

The property of a judge, his income, whether derived from this or any other source, we admit is a proper subject of taxation. (Id: p. 417.)

So long as a judge receives the same salary which he received at the beginning of his term, it can not be said that that salary has been diminished, in the sense of the Constitution, merely because he has been required to pay the same amount of tax paid by every citizen who enjoys the same amount of income. As said by the learned judge below, income may be taxable although derived from sources in themselves exempt from taxation, as in the cases of *Peck & Co. v. Lowe* and *United States Glue Co. v. Oak Creek*, *supra*.

THE UNSOUNDNESS OF PLAINTIFF IN ERROR'S CONTENTION ILLUSTRATED IN THE CASE OF THE PRESIDENT.

The inhibition of the Constitution against diminishing salaries during the term of service applies to the President as well as to judges. In the case of the President, however, the inhibition is twofold—his compensation is to be neither diminished nor increased. It is admitted by all that both the President and a judge must pay an income tax, treating his salary as a part of his income, if the law imposing the tax is in effect at the time his term of service begins. According to the argument of the plaintiff

in error, therefore, the compensation of the President or a judge is the salary fixed by law less the amount of income tax based on his salary which the law requires him to pay. In the case of the President, if he can not be required to pay an income tax imposed during his term of service upon the ground that to do so will diminish his compensation, then it is equally clear that if a tax is in effect at the time he assumes the duties of his office, but is repealed during the term of his service, to the extent of the tax, his compensation will be increased contrary to the provision of the Constitution. The next President of the United States will take the oath of office on the 4th of March, 1921. If it be assumed that at that time the law will require him to pay an income tax of \$10,000 based on his salary, according to the present argument the compensation will thus have been diminished from the amount of salary fixed by statute and he will, in fact, be receiving a compensation of \$65,000, instead of \$75,000, as the result of a general income tax. We may then suppose that, after he has been in office for a year, the income-tax law is repealed and there will be no law by which any citizen of the United States will be required to pay such a tax. The amount of \$10,000 can not be then demanded of the President as a tax because the law imposing it will have been repealed. But if the plaintiff in error is right in his contention, the result will be that, during his term of office, the President's compensation will have been increased to the extent of \$10,000. Under those conditions, must the Treasurer of the United

States pay him the salary of \$75,000 fixed by statute, or must he pay him only \$65,000, upon the theory that because of the existence of the income-tax law his compensation was only that amount when his term of service began? This question would seem to answer itself and be a complete refutation of the contention that making the judges subject to the same income tax which is paid by all other citizens enjoying the same incomes is a diminution of their compensation within the meaning of the Constitution. The true rule was thus stated by the court below:

Since the judge is, as others, subject to taxation, it may be stated that he owes the Government his fair share of the burden which the United States is obliged to impose upon its citizens for its support. On the other hand, the Government owes to him an undiminished compensation. But these are two independent accounts; neither may be justly said to impair the other. (Rec. p. 16.)

THE PRESENT CONTENTION INVOLVES NOT ONLY A CLAIM TO A GUARANTEED COMPENSATION, BUT ALSO A CLAIM TO EXEMPTION FROM THE ORDINARY BURDENS OF CITIZENSHIP, FOR WHICH THERE IS NO WARRANT IN THE CONSTITUTION.

There is no room for controversy over either the purpose or the wisdom of the inhibition against diminishing the salaries of judges. The purpose was to secure the independence of the judiciary, and no purpose which the framers of the Constitution had in mind was of more vital importance or is more deserving of preservation. Any legislation which really

infringes the inhibition of the Constitution, or, in fact, denies to a judge at least as much compensation as that fixed by law when he took the oath of office, should unhesitatingly be declared void, because no greater calamity could befall the country than an impairment of the independence of the judiciary. But this, like all other provisions of the Constitution, must be given a practical, sensible meaning, and not a strained or unnatural construction. Any United States judge, it is apprehended, would resent the idea that, because of his position, he should be exempt from the ordinary obligations resting upon citizens with no more than his ability to bear them. At the same time, every judge is ready to resist every assault upon the independence of the judiciary. The question then is, does this controversy really involve any question of diminishing the compensation of judges, or does it, in fact, deal only with his obligations as a citizen? That this tax law is what it purports to be—a general act of legislation for the raising of revenue—can not be doubted. Every citizen in the United States is required to pay the same income tax that is paid by every other citizen who has the same income. No discrimination is made in favor of any class. The tax in all cases is measured by the income received. Income received from one source is taxed at the same rate as income received from all other sources. The salary which a judge receives is included in his total taxable income, precisely as income received by him from any other source. He is taxed not because he is a judge of the United States, not

because he receives a certain amount of compensation from the Federal Government, but solely and alone because he enjoys a net income of a certain amount without regard to the source from which it was derived. The Congress of the United States, clothed with the taxing power, has determined that it is necessary for the proper support of the Government that all citizens shall contribute an amount to be measured by their income.

It may be conceded that if, under the guise of a taxing law, Congress undertook to discriminate against Federal judges and to arbitrarily impose upon them, as such, or upon their salaries a tax not imposed upon other citizens enjoying equal incomes, such a tax could properly be declared unconstitutional and void. *McCray v. United States*, 195 U. S. 27, 64. Again, if a special excise tax should be imposed upon the privilege of holding office under the United States Government, so that, by the very act of taking office and receiving compensation, a public official would be required to pay back a part of the compensation received, as a tax, it might be said, in the case of a judge, that the compensation received by him was, in fact, diminished by such a tax. But, as stated above, this is not a special tax directed at public officials or any other particular class.

The judges are entitled to receive an income from the Government which shall not be less than it was when their terms of office began. But when this income has been received, it is subject to the same burdens imposed by general laws which rest upon

similar incomes received by others from other sources. The revenue act does not lay a tax upon these incomes because of their source or in any discriminatory way. The tax is laid on them just as it is laid on other income. The tax is not laid on the salaries as such. It does not necessarily apply to the whole of the salaries received. These salaries simply go, along with any other income, to make up the gross income. From this the same exemptions and deductions are allowed which are allowed to other taxpayers. And, as in the case of all other taxpayers, what is taxed is the amount of the gross income after making these allowances. Of course, this diminishes the amount which the official has for other uses after discharging the obligations which, in common with other citizens, he owes the Government, just as the levying of taxes on property used in interstate or foreign commerce diminishes the net profits of the persons engaging in such business. This results, however, not because Congress has diminished the amount of the compensation, but because, by a general law, it has added another obligation. In other words, there has been no diminution in his compensation, but there has been merely an increase in the purposes to which that compensation, when received, will be devoted. This view, after all, can scarcely be better stated than by quoting again from the opinion of the learned judge below, as follows:

If a tax were indirectly laid upon judicial salary, as such, and "because of its source or

in a discriminative way," *Peck v. Lowe*, 247 U. S. 172, it might, perhaps, fairly be claimed to be a diminution of compensation. But a tax laid on incomes generally, including judicial salary, without discrimination, at a uniform rate, seems to be nothing other than the requiring of the judge his fair share of the burden aforesaid, measured by his income. His salary is not thereby diminished; his income is merely used as the fairest measure of his tax. The tax is, in effect, imposed upon the citizen in proportion to income. (Rec. p. 16.)

And again:

But there seems to be an inherent, fundamental distinction between equal participation in the general burden of a uniform income tax, and subjection to a discriminative salary tax. The one appears not to be directed against salaries, as such, but to fall only incidentally thereon, and therefore not to be a diminution thereof within the constitutional phrase. The other, merely seeking by classification to reclaim part of that paid out in compensation might, without injustice, be regarded as a diminution of the salary under the guise of taxation. (Rec. p. 17.)

And finally:

It seems, therefore, that the tax which the plaintiff now sues to recover is at most but an indirect or incidental burden upon judicial compensation resulting from a uniform and general income tax, and is therefore not a diminution of such compensation within the meaning of the Constitution. (Rec., p. 23.)

CONCLUSION.

It is respectfully submitted that the district court decided this case right and its judgment should be affirmed.

A. MITCHELL PALMER,
Attorney General.

WILLIAM L. FRIERSON,
Assistant Attorney General.

FEBRUARY, 1920.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 654.

WALTER EVANS, - - - - Plaintiff-in-Error,

versus

J. ROGERS GORE, DEPUTY AND ACTING
COLLECTOR OF INTERNAL REVENUE, - Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY.

WALTER EVANS,
Pro. Se.

FRANK P. STRAUS,
HOWARD B. LEE,
WM. MARSHALL BULLITT,
EDMUND F. TRABUE,
HELM BRUCE,
Of Counsel.

Westerfield-Bente Co., Incorporated, Louisville, Ky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 654.

WALTER EVANS, - - - - *Plaintiff in Error,*

vs.

J. ROGERS GORE, Deputy and Acting Col-
lector of Internal Revenue, - *Defendant in Error.*

**On Writ of Error to the District Court of the United
States for the Western District of Kentucky.**

REPLY BRIEF OF PLAINTIFF IN ERROR.

We think it is entirely accurate to say that one of the fundamental propositions, and indeed the principal one upon which the argument of the defendant in error (throughout called the defendant) is based; is: stated on page 29 of the brief filed in his behalf in two sentences which read thus: "The tax is not laid on salaries as such. It does not necessarily apply to the whole of the salary." This, we again venture to remind the court, seems most distinctly to ignore the express language of Section 213 of the Revenue Act which defines gross income as including the "compensation received *as such*" by the judges; and

also requires that ALL of that compensation shall be included in the tax returns for the taxable year in which it was received. In this case, furthermore, the defendant by his demurrer has plainly admitted to be true the facts, expressly shown by plaintiff's petition, that the *entire income taxation* for the taxable year 1918 assessed against the plaintiff and paid by him under protest *rested altogether upon the plaintiff's salary as judge and upon no other income whatever.*

The brief for defendant in the same connection on page 29 says: "The Revenue Act does not lay a tax upon those incomes because of their source or in any discriminatory way. The tax is laid on them just as it is laid on other incomes." These seem to be the propositions chiefly relied upon by defendant's counsel, as appears to be made clear in the earlier pages of the brief where other statements are found, such as, that "a judge while in office remains a citizen and is subject to the ordinary obligations which every citizen owes to his government"; that "the Constitution does not relieve him of those obligations during his continuance in office," and, "that there is no guarantee that the fixed sum received by him shall continue to have the same purchasing power or be less than those of other citizens."

At the outset these observations of defendant's counsel lead to the inquiry whether any Federal judge in our history, including the time up to the present, ever made a claim in the least degree like

either of those thus suggested to the court in defendant's brief? Certainly they do not seem to meet the proposition that the Constitution of the United States, while forbidding the diminution of judicial compensation, in no way forbids diminution of individual incomes by taxation. Nor does it forbid the diminution of any income a judge may receive from other sources. Without repeating what has been said in our original brief we may point out that what we seek here is not any advantage over other citizens but a fair and proper construction of the Constitution of the United States which expressly and imperatively forbids the diminution of judicial compensation, but does not forbid the lowering of the purchasing power of the money in which that compensation is paid, although, as urged by Hamilton in the *Federalist*, the fact that there are changes of the purchasing power of money was one of the strong arguments in favor of the constitutional provision. The undoubted fact as shown by all history is that the purchasing power of money greatly changes, but, of course, there is no accompanying readjustment of the constitutional provision by which to prevent, from that cause, any diminution of judicial compensation while a judge is in office. Had there been a constitutional provision forbidding the diminution of the incomes of citizens generally the appropriateness of defendant's suggestion might be manifest, but in the absence of such provision the argument seems to us to beg the question involved and to seek to in-

fluence the court in its determination of that question by urging that there will be no vindication of the Constitution but only an undue advantage to the judge over other citizens. We submit that this ignores the great and fundamental principles upon which Article 3, Section 1, forbidding diminution of judicial compensation, is based.

If there were pending before the people a proposition to make or to amend a constitution, the arguments we have referred to might win applause or influence popular opinion, though if ever heretofore made they have failed in most of the States of the Union, nearly all of which in their constitutions forbid the diminution of judicial salaries, and such salaries are rarely taxed by any State for that reason. Here there is no proposition to make or to amend a constitution. We are only striving to uphold a construction always in force up to February, 1919, of Article 3, Section 1 of the Constitution. The Constitution plainly makes a difference between a Federal judge's *compensation as such* and that of other citizens, and indeed between his compensation as a judge and his income derived from other and general sources. And this so-called discrimination must be made, not merely that the judge's salary shall escape taxation (though it occurs in nearly all the States), but because the Constitution requires it in order to aid in securing the independence of the judiciary. We hope we do not misconstrue the argument for the defendant, but it can not escape obser-

vation that the brief of his counsel, while admitting (page 3) that heretofore by all provisions of statutory law which mentioned it (for example, the income tax acts of 1913, 1916 and 1917) there was discrimination in expressly exempting judicial compensation from income taxation, yet that now for the first time it has been imposed by the Act of February 24, 1919, upon a changed public opinion and the influence of the 16th Amendment. These last statements are based upon what appears in defendant's brief in these words:

"Congress already had ample power to tax income regardless of the source from which derived; but income derived from certain sources was not taxable without apportionment among the States. The sixteenth amendment merely removed this restriction and placed it in the power of Congress to tax, without apportionment, income of all kinds. *Except to this extent, then, the act in question does not rest for its validity, upon the sixteenth amendment.* (Italics ours.)

The course of legislation which has resulted in the act now involved has been gradual. In the earlier acts, Congress saw fit to exempt the salaries of the judges then in office. Thus, in the act of 1913 (38 Stat., c. 16, pp. 166-180) it was provided that in computing net income there should be excluded—

the compensation of the present President of the United States during the term for which he has been elected, and of the judges of the supreme and inferior courts of the United States now in office, and the compensation of all officers and employes of a State or any political subdivision thereof except when such

compensation is paid by the United States Government (p. 168).

This same provision was carried into the acts of 1916 and 1917. The act of 1917 went further. It levied upon the income of every corporation, partnership, or individual a tax called the 'War Excess Profits Tax,' but provided that this tax should not include—

In the case of officers and employees under the United States, or any State, Territory, or the District of Columbia, or any local sub-division thereof, the compensation or fees received by them as such officers or employees (40 Stat., c. 63, p. 303).

It will be noted that in these earlier acts, except in the case of the war excess profits tax, the only exemption to officers of the United States applied to the President and the judges then in office. Article II, Section 1, of the Constitution provides that the compensation of the President shall neither be increased nor diminished during the period for which he shall have been elected. Since, therefore, Congress provided for exemptions only in the case of those Federal officials whose salaries were protected by the Constitution against diminution, it is doubtless true that these exemptions were provided because Congress then took the view that not to allow the exemptions would be contrary to the provisions of the Constitution against diminishing salaries.

In enacting the act of 1918, however, Congress had evidently come to the conclusion that the Constitution did not require these exemptions, and therefore it required the salaries of these officials to be included in their taxable incomes."

Evidently 1918 is an error, as the Act was approved in 1919.

THE SIXTEENTH AMENDMENT.

The other proposition urged in defendant's brief (though it seems to be pressed on a very minor key, as shown in the above extract) is that the 16th Amendment authorizes and indeed caused the enactment by Congress of those provisions of the Revenue Act which plaintiff's suit calls in question. And, as we suggested in our original brief, that view is almost a necessity to any argument in support of the demurrer to plaintiff's petition. However, there can be no doubt of the accuracy of the adverse ruling of the learned District Court upon that proposition, inasmuch as it is supported by the rulings of this Honorable Court in recent and most familiar decisions.

DIMINUTION.

The argument for defendant apparently seeks a definition of the word "diminished," as used in Article 3, Section 1, of the Constitution, which would imply that nothing can harmfully reach that result unless it is discriminatory in its operation upon the incomes of different individuals. Indeed, as we read defendant's brief, *there is no claim made that taxation does not in fact diminish the salaries of the judges*, but that such diminution is not wrongful so long as it operates upon all incomes alike. Abstractly that view might be ethical in its operation, but we submit that it does not meet the requirements of this

case. Here the Constitution demands discrimination in respect to the compensation of the judges because otherwise their compensation would be reduced, and there is no constitutional provision that forbids the diminution of the income of individuals outside of the judiciary. This discrimination therefore, is expressly required by the Constitution instead of being forbidden.

Indeed, reduced to its last analysis, the argument presented in defendant's brief seems to attempt to maintain the proposition that a judge's salary may be diminished by Congress through taxation whenever it sees fit to do so, so long as that salary is not subjected to burdens different from those imposed upon other citizens. The logic of this contention would seem to imply that the defendant's counsel finds somewhere in the Constitution a rule for classification based upon uniformity, when in fact nothing of the kind can be found in that instrument in respect to taxation as distinguished from duties, imposts and excises, which are regulated by Article 1, Section 8, Clause 1.

CLASSIFICATION NOT FORBIDDEN.

One of the strongest arguments against the statute and in vindication of the effort to give Article 3, Section 1, of the Constitution, full operation, is that no provision for uniformity nor any forbidding classification can be found therein. If Congress has

power to tax judicial salaries at all, it may exercise it without limit, and thereby destroy it.

The Attorney General in his opinion in part and the District Court wholly seemed to proceed upon the idea that the income tax law affected judicial salaries not differently nor otherwise than it affected the incomes of all other people and from all other sources. But can any one doubt the power of Congress today (and it may come to it in the near future) to levy (1) a heavy rate of tax upon income from inherited and invested wealth; (2) a less rate upon income from agricultural pursuits; (3) a small or no rate at all upon income from manual labor occupations. We often see in these days exemptions made in respect of the last two occupations from the effect of legislation which would otherwise be general in its operation. This but illustrates a phase of the power of classification and it is but a step, and a short one not unlikely to be taken, to lead it into the realm of income taxation. If the power to tax the compensation of judges of the courts of the United States which the Constitution says shall not be diminished be once admitted, who can put limits to that power? What constitutional provision is there restraining its exercise to the level of uniformity or prohibiting discrimination by reason of the character of the office, or, indeed, the duration of the tenure. If the conclusion that the salaries are subject to the tax is once established, then why may not Congress subject them to special tax impositions un-

der its power of classification? If the constitutional provision in Article 3 does not except such salaries from income taxes, who could say that the duration of the judicial terms of office would not be a sufficient ground for a special classification for the imposition of taxes greater than those imposed upon other sorts of income? The power of Congress to classify for the purpose of legislation is practically unlimited, and if Article 3 affords no protection against diminution by taxation, it is easy to foresee what may result.

ARTICLE 3, SECTION 1 IS IMPERATIVE.

In *Martin v. Hunter*, 1 Wheaton, 305, 333, Mr. Justice Story said:

“It will be found that whenever a particular object is to be effected, the language of the Constitution is always imperative, and can not be disregarded, without violating the first principles of public duty.”

We most earnestly submit that the words of Article 3, Section 1, of the Constitution that “the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office,” were used when *two particular objects*, respecting the judges *were to be affected*, namely, first, their continuance in office during good behavior, and, second, the payment to them of a com-

compensation which should not be diminished during their continuance in office.

The decision of this court in *Martin v. Hunter*, therefore, seems absolutely to be controlling to the effect that the language of Article 3, Section 1, is "IMPERATIVE" alike as to the tenure of the office of the judges and the undiminishable character of their compensation. Indeed, it seems clear that Congress has no more power to diminish their compensation than it has to change the tenure of office of the judges of the United States.

PRESIDENTIAL COMPENSATION.

For some reason not known to us but which, of course, counsel for the defendant in error had in mind, somewhat extensive statements are made in the brief respecting the fact that by the provisions of Section 213 of the Revenue Act the compensation of the President is also subjected to income taxation. Whatever may have been the purpose of this, all we can do is to submit the serious and respectful inquiry: What has it to do with the decision of the questions raised here in a suit duly brought after payment of taxes under protest and where all the facts alleged in plaintiff's pleading are admitted to be true, and where the sole purpose of the litigation is to secure from this Honorable Court a final settlement of the questions raised therein, viz., whether Congress has power to diminish *judicial compensa-*

tion by taxation thereon in spite of the provisions of Article 3, Section 1 of the organic law of the Nation which attempted thereby to safeguard the independence of the judiciary? And in this connection it is submitted that it is common knowledge that Article 3, Section 1 of the Constitution is limited in respect to the diminution of judicial compensation to that of judges in office when the law was passed. Any anomaly resulting in respect to those who come in after that event with full knowledge of the constitutional limitation would be for Congressional consideration, and we venture the suggestion that in all probability it would be remedied through a sense of what is fair and right and in conformity to wise policies. This probability, we think, is heightened by the wellknown fact, admitted to be true in defendant's brief, that nearly all of the States of the Union have adopted and followed the wise public policy of forbidding the diminution of the compensation of their judges during their continuance in office.

It is also admitted by defendant's brief that the decision in *Collector v. Day*, 11 Wallace, 113, 127, saves the rights of all State, county, district and municipal officers of the States from income taxation by the United States. It was there said:

"It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means

and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

“But we are referred to the *Veazie Bank v. Fenno*, 8 Wallace, 533, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch v. Maryland*, namely, ‘That the power to tax involves the power to destroy’ ”!

These propositions, especially the last, can not be too impressively urged. Any disregard of the decision in that case is not likely to be attempted while it has the support of so powerful a political influence as that of 60,000 State officers, but the Federal judiciary, limited in numbers as it is, must protect itself or it may be overcome, as there is no one but itself to protect it against possible or insidious encroachments. And we submit, 1st, that the Constitution meant to endow the judiciary with power to protect itself through this great tribunal, 2nd, that this is the first and only instance in our entire history when the law department of the government joined in an effort tending to undermine the independence of the judiciary—all for the sake of revenue and in disregard of the imperative prohibition contained in

Article 3, Section 1 of the Constitution, and, 3rd, that we have taken the only pathway which may lead to the great purpose we have in view.

We respectfully submit that the judgment of the court below should be reversed.

WALTER EVANS,
Pro Se.

FRANK P. STRAUS,
HOWARD B. LEE,
WM. MARSHALL BULLITT,
EDMUND F. TRABUE,
HELM BRUCE,
Of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1919.

No. 654.

WALTER EVANS, PLAINTIFF-IN-ERROR,

versus

J. ROGERS GORE, DEFENDANT-IN-ERROR.

MEMORANDUM OF POINTS AND ADDITIONAL
AUTHORITIES.

WM. MARSHALL BULLITT,
EDMUND F. TRABUE,
For Plaintiff.

SUPREME COURT OF THE UNITED STATES.

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J. ROGERS GORE, DEFENDANT-IN-ERROR.

**MEMORANDUM OF POINTS AND ADDITIONAL
AUTHORITIES.**

I.

Art. 3, Sec. 1, forbids diminution of a judge's salary during his term of office, and the law forbids a thing done indirectly which is forbidden to be done directly.

Brown vs. Maryland, 12 Wheat., 419.

Weston vs. Charleston, 2 Pet., 449.

Cummings vs. Missouri, 4 Wall., 238.

Coke, 2 Inst., 48, 202.

Broom, Legal Max., p. 367.

Burrill Law Dict., citing *Coke*, *supra*, and *Broom*, 202.

Fairbank vs. U. S., 181 U. S., 283.

In *Brown vs. Maryland* the court said:

"All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself. It is true this State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business * * *."

In *Weston vs. Charleston*—Held

That a tax on income of Government securities was a tax on the securities.

In *Cummings vs. Missouri*—Held

That a result inadmissible could not be reached by indirect method of a test oath.

In 2 *Coke, Inst.*, 48, the maxim *Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud.* is expounded. See, also, *Quando aliquid prohibetur ex Directo, prohibetur et per obliquum.* *Coke Litt.*, 223.

Woodruff vs. Parham, 8 Wall., 123, is cited in *Fairbank vs. U. S.*, as follows:

"In other words, that decision affirms the great principle that what cannot be done directly because of unconstitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. But that principle is not dependent alone upon the case cited. It was recognized long anterior thereto in *Brown vs. Maryland*, 12 Wheat., 419.

"A tax on the bill of lading is a tax on the export covered by it."

Fairbank vs. U. S., 181 U. S., 283, 290, 291.

II.

"The test of the constitutionality of a statute is not what has been done, but what, by its authority, may be done under it."

Ames vs. People, 26 Colo. (Item 6), pp. 83, 109.

Eubank vs. Richmond, 226 U. S., 137, 144.

III.

The power to tax is the power to destroy.

Brown vs. Maryland, 12 Wheat., 419, 445.

Austin vs. Boston, 7 Wall., 694.

Veazie vs. Fenno, 8 Wall., 533.

McCray vs. U. S., 195 U. S., 27, etc., etc.

IV.

Taxation may, allowably, be used for destruction.

Veazie vs. Fenno, 8 Wall., 533.

Citizens Tel. Co. vs. Fuller, 229 U. S., 322, 329.

St. Louis Poster Co. vs. St. Louis, 249 U. S., 272, 274.

If, therefore, the salaries of the judges are like the incomes of other people their salaries may be taxed for purpose of destruction; may be taxed to destruction; an easy way to destroy the independence of the judiciary is found, and Art. 3, Sec. 1, of the Constitution will have been destroyed by the simple device, forbidden by legal maxim, of doing indirectly what could not be done directly.

V.

Dobbins vs. Com., 16 Pet., 434, expounding the prohibition of a State's taxing the salaries of Federal officers, and *Buf-*

fington, collector, vs. *Day*, 11 Wall., 113, 127, expounding the prohibition of the Federal Government's taxing the salaries of State judges, are conclusive on our contention because they declared against the power to tax on the ground that the authority would place one government in the power of the other, the power to tax being the power to destroy, and although the Federal Government may tax its officers, generally, to destruction its invasion of the judiciary is arrested by *Art. 3, Sec. 1*, of the Constitution.

In *Fairbank vs. U. S.*, 181 U. S., 283, 291, it was said:

"It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*" (*ibid.*, 302, quoting *Boyd vs. U. S.*, 116 U. S., 616; *Debs' Case*, 158 U. S., 594).

The judge, then, is stripped of the protection of the Constitution in the seclusion of his profound study and cast into the political arena to join his "*Class*" (*Rec.*, p. 19) and make terms with "The Powers That Be!"

Very respectfully,

WM. MARSHALL BULLITT,
EDMUND F. TRABUE,

For Plaintiff.

(991)

SUPREME COURT OF THE UNITED STATES.

No. 654.—OCTOBER TERM, 1919.

(253, 218)

Walter Evans, Plaintiff in Error,	} In Error to the District Court of the United States for the Western District of Ken- tucky.
<i>vs.</i>	
J. Rogers Gore, Acting Collector, etc.	

[June 1, 1920.]

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an action to recover money paid under protest as a tax alleged to be forbidden by the Constitution.

The plaintiff is the United States District Judge for the Western District of Kentucky, and holds that office under an appointment by the President made in 1899 with the advice and consent of the Senate. The tax which he calls in question was levied under the Act of February 24, 1919, c. 18, 40 Stat. 1062, on his net income for the year 1918, as computed under that act. His compensation or salary as District Judge was included in the computation. Had it been excluded he would not have been called on to pay any income tax for that year. The inclusion was in obedience to a provision in § 213 requiring the computation to embrace all gains, profits, income and the like, "including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, [and others] . . . the compensation received as such." Whether he could be subjected to such a tax in respect of his salary, consistently with the Constitution, is the matter in issue. If it be resolved against the tax he will be entitled to recover what he paid; otherwise his action must fail. It did fail in the District Court. 262 Fed. 550.

The Constitution establishes three great coordinate departments of the National Government,—the legislative, the executive, and the judicial,—and distributes among them the powers confided to that Government by the people. Each department is dealt with in a separate Article, the legislative in the first, the executive in the second and the judicial in the third. Our present concern is chiefly with the third Article. It defines the judicial power, vests it in

one supreme court and such inferior courts as Congress may from time to time ordain and establish, and declares: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The plaintiff insists that the provision in § 213 which subjects him to a tax in respect of his compensation as a judge by its necessary operation and effect diminishes that compensation and therefore is repugnant to the constitutional limitation just quoted.

Stated in its broadest aspect, the contention involves the power to tax the compensation of federal judges in general,—and also the salary of the President, as to which the Constitution (Art. II, § 1, cl. 6) contains a similar limitation. Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course, the Government joined him in asking an early determination of the question involved, and both have been heard at the bar and through printed briefs. In this situation, the only course open to us is to consider and decide the cause,—a conclusion supported by precedents reaching back many years. Moreover, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality and both contemplated and intended that the question should be settled by us in a case like this.*

*See House Report, No. 767, p. 29, 65th Cong., 2d Sess.; Senate Report, No. 617, p. 6, 65th Cong., 3rd Sess. And see Cong. Record, Vol. 56, p. 10370, where the Chairman of the House Committee, in asking the adoption of the provision, said: "I wish to say, Mr. Chairman, that while there is considerable doubt as to the constitutionality of taxing . . . Federal judges' or the President's salaries, . . . we cannot settle it; we have not the power to settle it. No power in the world can settle it except the Supreme Court of the United States. Let us raise it, as we have done, and let it be tested, and it can only

With what purpose does the Constitution provide that the compensation of the judges "shall not be diminished during their continuance in office"? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?

The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers,—the legislative, the executive, and the judicial,—in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

The particular need for making the judiciary independent was elaborately pointed out by Alexander Hamilton in the *Federalist*, No. 78, from which we excerpt the following:

"The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction

be done by some one protesting his tax and taking an appeal to the Supreme Court." And again: "I think really that every man who has a doubt about this can very well vote for it and take the advice of the gentleman from Pennsylvania [Mr. Graham], which was sound then and is sound now, that this question ought to be raised by Congress, the only power that can raise it, in order that it may be tested in the Supreme Court, the only power that can decide it."

either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. . . . This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

At a later period John Marshall, whose rich experience as lawyer, legislator, and Chief Justice enabled him to speak as no one else could, tersely said (Debates Va. Conv., 1829-1831, pp. 616, 619) :

"Advert, Sir, to the duties of a Judge. He has to pass between the Government and the man whom that Government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

More recently the need for this independence was illustrated by Mr. Wilson, now the President, in the following admirable statement:

"It is also necessary that there should be a judiciary endowed with substantial and independent powers and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government.

"Indeed there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual."

"Our courts are the balance-wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some non-political forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty." *Constitutional Government in the United States*, pp. 17, 142.

Conscious of the nature and scope of the power being vested in the national courts, recognizing that they would be charged with responsibilities more delicate and important than any ever before confided to judicial tribunals, and appreciating that they were to be, in the words of George Washington¹, "the keystone of our political fabric", the convention with unusual accord incorporated in the Constitution the provision that the judges "shall hold their offices during good behaviour and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." Can there be any doubt that the two things thus coupled in place—the clause in respect of tenure during good behavior and that in respect of an un-

¹Sparks' Washington, Vol. X, pp. 35-36.

diminishable compensation—were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task and with the imperative need for its impartial and fearless performance? Mr. Hamilton said in explanation and support of the provision (Federalist, No. 79): “Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man’s subsistence amounts to a power over his will.* . . . The enlightened friends of good government in every state have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. . . . This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges.” The several commentators on the Constitution have adopted and reiterated this view,¹—Judge Story adding: “Without this provision [as to an undiminishable compensation], the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery”; and Chancellor Kent observing: “It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station.”

These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice

¹² Story, § 1628; 1 Kent’s Com. *294; 1 Wilson’s Works, 410, 411; 2 Tucker, § 364; Miller, 340-343; 1 Carson’s Supreme Court, 6.

without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.

Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished. Of course, the conclusion that it was diminished is the natural one. This is illustrated in *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 450, which involved a tax charged under a law of Pennsylvania against a revenue officer of the United States who was a citizen and resident of that State. The tax was adjusted or proportioned to his compensation, and the state court sustained it. 7 Watts 513. In reversing that decision, this court, after showing that the compensation had been fixed by a law of Congress, said: "Does not a tax then by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional."

But it is urged that what the plaintiff was made to pay back was an income tax, and that a like tax was exacted of others engaged in private employment.

If the tax in respect of his compensation be prohibited, it can find no justification in the taxation of other income as to which there is no prohibition; for, of course, doing what the Constitution permits gives no license to do what it prohibits.

The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.

True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In *Collector v. Day*, 11 Wall. 113, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 585, 601, 652, 653, it was held—the full court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a State or any of its counties or municipalities; and in *United States v. Railroad Co.*, 17 Wall. 322, there was a like holding as to municipal revenues derived by the city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the States within their own spheres.

When we consider, as was done in those cases, what is comprehended in the congressional power to tax,—where its exertion is not directly or impliedly interdicted,—it becomes additionally manifest that the prohibition now under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it “the power to embarrass and destroy”; may be applied to every object within its range “in such measure as Congress may determine”; enables that body “to select one calling and omit another, to tax one class of property and to forbear to tax another”; and may be applied in different ways to different objects so long as there is “geographical uniformity” in the duties, imposts and excises imposed. *McCulloch v. Maryland*, 4 Wheat. 316, 431; *Pacific Insurance Co. v. Soule*, 7 Wall. 433, 443; *Austin v. The Aldermen*, 7 Wall. 694,

699; *Veazie Bank v. Fenno*, 8 Wall. 533, 541, 548; *Knowlton v. Moore*, 178 U. S. 41, 92, 106; *Treat v. White*, 181 U. S. 264, 268-269; *McCray v. United States*, 195 U. S. 27, 61; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 158; *Billings v. United States*, 232 U. S. 261, 282; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 24-26. Is it not therefore morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on securing the independence of the judiciary intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and in our opinion due regard for its spirit and principle requires that it be taken as directed against them all.

This view finds support in rulings in Pennsylvania, Louisiana and North Carolina made under like constitutional restrictions, *Commonwealth ex rel. v. Mann*, 5 Watts & Serg. 403, 415, *et seq.**; *New Orleans v. Lea*, 14 La. Ann. 197; 48 N. C., Appendix; N. C. Public Documents 1899, Doc. No. 8, p. 95; 131 N. C. 692; *Purnell v. Page*, 133 N. C. 125, and has strong sanction in the actual practice of the Government, to which we now advert.

No attempt was made to tax the compensation of federal judges prior to 1862. A statute of that year, c. 119, § 86, 12 Stat. 472, with its amendments, subjected the salaries of all civil officers of the United States to an income tax of three per cent. and was construed by the revenue officers as including the compensation of the President and the judges. Chief Justice Taney, the head of the judiciary, wrote to the Secretary of the Treasury a letter of protest (157 U. S. 701), based on the prohibition we are considering, and in the course of the letter said:

“The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished

*The tax condemned was levied under a provision, in a general revenue law, charging a tax of two per cent. “upon all salaries and emoluments of office, created or held by or under the constitution or laws of this commonwealth, and by or under any incorporation, institution, or company incorporated by the said commonwealth, where such salaries or emoluments exceed two hundred dollars”. Act No. 232, § 2, Penn. Laws 1840, p. 613; Act No. 117, § 9, Penn. Laws 1841, p. 310.

to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

"The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

"Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void."

The collection of the tax proceeded, and, at the suggestion of the Chief Justice, this court ordered his protest spread on its records. In 1869 the Secretary of the Treasury referred the question to the Attorney General (Judge Hoar) and that officer rendered an opinion in substantial accord with Chief Justice Taney's protest, and also advised that the tax on the President's compensation was likewise invalid. 13 Op. A. G. 161. The tax on the compensation of the President and the judges was then discontinued, and the amounts theretofore collected were all refunded,—a part through administrative channels and a part through the action of the Court of Claims and ensuing appropriations by Congress. *Wayne v. United States*, 26 Ct. Cls. 274; c. 311, 27 Stat. 306. Thus the Secretary of the Treasury, the accounting officers, the Court of Claims and Congress accepted and gave effect to the view expressed by the Attorney General. In the Income Tax Act of 1894, c. 349, § 27, *et seq.*, 28 Stat. 509, nothing was said about the compensation of the judges; but Mr. Justice Field regarded it as included and gave that as one reason for joining in the decision holding the act unconstitutional. 157 U. S. 604-606. On the rehearing the Attorney General (Mr. Olney) frankly said in his brief: "There

has never been a doubt since the opinion of Attorney General Hoar that the salaries of the President and judges were exempt." The income tax acts of 1913, 1916 and 1917 (c. 16, 38 Stat. 168; c. 463, 39 Stat. 758; c. 63, 40 Stat. 329) severally excepted the compensation of the judges then in office,—also that of the President for the then current term. In short, during a period of more than one hundred and twenty years there was but a single real attempt to tax the judges in respect of their compensation, and that attempt soon was disapproved and pronounced untenable by the concurring action of judicial, executive and legislative officers. And so it is apparent that in the actual practice of the Government the prohibition has been construed as embracing and preventing diminution by taxation.

Does the Sixteenth Amendment authorize and support this tax and the attendant diminution; that is to say, does it bring within the taxing power subjects theretofore excepted? The court below answered in the negative; and counsel for the Government say, "It is not, in view of recent decisions, contended that this Amendment rendered anything taxable as income that was not so taxable before". We might rest the matter here, but it seems better that our view and the reasons therefor be stated in this opinion, even if there be some repetition of what recently has been said in other cases.

Preliminarily we observe that, unless there be some real conflict between the Sixteenth Amendment and the prohibition, in Article III, section 1, making the compensation of the judges undiminishable, effect must be given to the latter as well as to the former; and also that a purpose to depart from or imperil a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed.

In *Knowlton v. Moore*, *supra*, p. 95, this court said: "The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning." This sound rule is as applicable to the Amendments as to the provisions of the original Constitution.

Let us turn then to the circumstances in which this Amendment was proposed and ratified and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several States according to their population, as ascertained by a census or enumeration (Art. I, § 2, cl. 3, and § 9, cl. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within that requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601; and the decision when announced disclosed that the same differences in opinion existing elsewhere were shared by the members of the court,—five, the controlling number, regarding a tax on such income as in effect a direct tax on the property from which it arose and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the States were essential, the Sixteenth Amendment was proposed and ratified. In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came,—a change in no wise affecting the power to tax but only the mode of exercising it. The message of the President¹ recommending the adoption by Congress of a joint resolution proposing the Amendment, the debates² on the resolution by which it was proposed, and the public appeals³—corresponding to those in the *Federalist*—made to secure its ratification leave no doubt on this point. And that the proponents of the Amendment in drafting

¹Cong. Rec., Vol. 44, p. 3344.

²Cong. Rec., Vol. 44, pp. 1568-1570, 3377, 3900, 4067, 4105-4107, 4108-4121, 4389-4441.

³Cong. Rec., Vol. 45, pp. 1694-1699, 2245-2247, 2539-2540.

it lucidly and aptly expressed this as its object is shown by its words:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

True, Governor Hughes, of New York, in a message laying the Amendment before the legislature of that State for ratification or rejection, expressed some apprehension lest it might be construed as extending the taxing power to income not taxable before; but his message promptly brought forth from statesmen who participated in proposing the Amendment such convincing expositions of its purpose,¹ as here stated, that the apprehension was effectively dispelled and ratification followed.

Thus the genesis and words of the Amendment unite in showing that it does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the States of taxes laid on income, whether derived from one source or another.² And we have so held in other cases.

In *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, where the purpose and effect of the Amendment were first drawn in question, the Chief Justice reviewed at length the legislative and judicial action which prompted its adoption and then, referring to its text and speaking for a unanimous court, said, pp. 17-18:

"It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed in the light of the history which we have given and of the decision in the *Pollock Case* and the ground upon which the ruling in that case was based, there

¹Cong. Rec., Vol. 45, pp. 1694-1699, 2245-2247, 2539-2540.

²In passing the income tax law of 1919 Congress refused to treat interest received from bonds issued by a State or any of its counties or municipalities as within the taxing power, Cong. Rec., Vol. 57, pp. 553, 774-777, 2988; ch. 18, § 213, 40 Stat. 1065; and in the regulations issued under that law the administrative officers recognize that the salaries and emoluments of the officers of a State and its political subdivisions are not taxable by the United States. Reg. 45, published 1920, pp. 47, 313.

is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income was derived, shall not be subject to the regulation of apportionment."

What was there said was reaffirmed and applied in *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 112-113, and *Peck & Co. v. Lowe*, 247 U. S. 165, 172; and in *Eisner v. Macomber*, — U. S. —, decided at the present term, we again held, citing the prior cases, that the Amendment "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income."

After further consideration, we adhere to that view and accordingly hold that the Sixteenth Amendment does not authorize or support the tax in question.

Apart from his salary, a federal judge is as much within the taxing power as other men are. If he has a home or other property, it may be taxed just as if it belonged to another. If he has an income other than his salary, it also may be taxed in the same way. And, speaking generally, his duties and obligations as a citizen are not different from those of his neighbors. But for the common good—to render him, in the words of John Marshall, "perfectly and completely independent, with nothing to influence or control him but God and his conscience"—his compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support.

The court below concluded that the compensation was not diminished, and regarded this as inferable from our decisions in *Peck & Co. v. Lowe*, 247 U. S. 165, 174-175, and *United States Glue Co. v. Oak Creek*, *ibid.* 321, 329. We think neither case tends to support that view. Each related to a business—one to exportation, the other to interstate commerce—which the taxing power—of Congress in one case, of a State in the other—was restrained from directly burdening; and the holding in both was that an

income tax laid, not on the gross receipts, but on the net proceeds remaining after all expenses were paid and losses adjusted, did not directly burden the business, but only indirectly and remotely affected it. Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation as well as otherwise. The taxing act directs that the compensation—the full sum, with no deduction for expenses—be included in computing the net income, on which the tax is laid. If the compensation be the only income, the tax falls on it alone; and, if there be other income, the inclusion of the compensation augments the tax accordingly. In either event the compensation suffers a diminution to the extent that it is taxed.

We conclude that the tax was imposed contrary to the constitutional prohibition and so must be adjudged invalid.

Judgment reversed.

A true copy.

Test:

Clerk Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 654.—OCTOBER TERM, 1919.

Walter Evans, Plaintiff in Error,	}	In Error to the District Court of the United States for the Western District of Kentucky.
vs.		
J. Rogers Gore, Acting Collector, etc.		

[June 1, 1920.]

Mr. Justice HOLMES, dissenting.

This is an action brought by the plaintiff in error against an acting Collector of Internal Revenue to recover a portion of the income tax paid by the former. The ground of the suit is that the plaintiff is entitled to deduct from the total of his net income six thousand dollars, being the amount of his salary as a judge of the District Court of the United States. The Act of February 24, 1919, c. 18, § 210, 40 Stat. 1057, 1062, taxes the net income of every individual, and § 213, p. 1065, requires the compensation received by the judges of the United States to be included in the gross income from which the net income is to be computed. This was done by the plaintiff in error and the tax was paid under protest. He contends that the requirement mentioned and the tax, to the extent that it was enhanced by consideration of the plaintiff's salary, are contrary to Article 3, Section 1, of the Constitution, which provides that the compensation of the judges shall not be diminished during their continuance in office. Upon demurrer judgment was entered for the defendant, and the case comes here upon the single question of the validity of the above mentioned provisions of the act.

The decision below seems to me to have been right for two distinct reasons: that this tax would have been valid under the original Constitution, and that if not so, it was made lawful by the Sixteenth Amendment. In the first place I think that the clause protecting the compensation of judges has no reference to a case like this. The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground,

as it was put by Hamilton in the Federalist, (No. 79,) that 'a power over a man's subsistence amounts to a power over his will'. That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends.

I see equally little in the letter of the clause to indicate the intent supposed. The tax on net incomes is a tax on the balance of a mutual account in which there always are some and may be many items on both sides. It seems to me that it cannot be affected by an inquiry into the source from which the items more or less remotely are derived. Obviously there is some point at which the immunity of a judge's salary stops, or to put it in the language of the clause, a point at which it could not be said that his compensation was diminished by a charge. If he bought a house the fact that a part or the whole of the price had been paid from his compensation as judge would not exempt the house. So if he bought bonds. Yet in such cases the advantages of his salary would be diminished. Even if the house or bonds were bought with other money the same would be true, since the money would not have been free for such an application if he had not used his salary to satisfy other more peremptory needs. At some point, I repeat, money received as salary loses its specific character as such. Money held in trust loses its identity by being mingled with the general funds of the owner. I see no reason why the same should not be true of a salary. But I do not think that the result could be avoided by keeping the salary distinct. I think that the moment the salary is received, whether kept distinct or not, it becomes part of the general income of the owner, and is mingled with the rest, in theory of law, as an item in the mutual account with the United States. I see no greater reason for exempting the recipients while they still have the income as income than when they have invested it in a house or bond.

The decisions heretofore reached by this Court seem to me to justify my conclusion. In *Peck & Co. v. Lowe*, 247 U. S. 165, a

tax was levied by Congress upon the income of the plaintiff corporation. More than two-thirds of the income were derived from exports and the Constitution in terms prohibits any tax on articles exported from any State. By construction it had been held to create 'a freedom from any tax which directly burdens the exportation,' *Fairbank v. United States*, 181 U. S. 283, 293. The prohibition was unequivocal and express, not merely an inference as in the present case. Yet it was held unanimously that the tax was valid. "It is not laid on income from exportation in a discriminative way, but just as it is laid on other income. . . . There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied . . . after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income is as far removed from exportation as are articles intended for export before the exportation begins." 247 U. S. 174, 175. All this applies with even greater force when, as I have observed, the Constitution has no words that forbid a tax. In *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, the same principle was affirmed as to interstate commerce and it was said that if there was no discrimination against such commerce the tax constituted one of the ordinary burdens of Government from which parties were not exempted because they happened to be engaged in commerce among the States.

A second and independent reason why this tax appears to me valid is that, even if I am wrong as to the scope of the original document, the Sixteenth Amendment justifies the tax, whatever would have been the law before it was applied. By that amendment Congress is given power to "collect taxes on incomes from whatever source derived." It is true that it goes on "without apportionment among the several States, and without regard to any census or enumeration", and this shows the particular difficulty that led to it. But the only cause of that difficulty was an attempt to trace income to its source, and it seems to me that the Amendment was intended to put an end to the cause and not merely to obviate a single result. I do not see how judges can claim an abatement of their income tax on the ground that an item in their gross income is salary, when the power is given expressly to tax incomes from whatever source derived.

Mr. Justice BRANDEIS concurs in this opinion.

TAXATION OF SALARIES OF FEDERAL JUDICIARY.

IN THE
District Court of the United States
FOR THE WESTERN DISTRICT OF KENTUCKY.

OCTOBER TERM, 1919.

WALTER EVANS,

Plaintiff,

vs.

J. ROGER GORE, Deputy and Acting Collector of
Internal Revenue,

Defendant.

BRIEF FOR PLAINTIFF

In support of the contention that so much of the Income Tax Law of February 24, 1919, as taxes the salary of Federal judges (appointed to office before that date) is unconstitutional.

WALTER EVANS,

Pro Se.

FRANK B. STRAUS,
HOWARD B. LEE,
WM. MARSHALL BULLITT,
EDMUND F. TRABUE,

Of Counsel.

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IN THE
District Court of the United States
FOR THE
WESTERN DISTRICT OF KENTUCKY.

WALTER EVANS,

Plaintiff,

vs.

J. ROGERS GORE, Deputy and Acting Collector of
Internal Revenue,

Defendant.

BRIEF FOR PLAINTIFF.

Statement of Facts.

Section 213 of the Act entitled "*An Act to provide revenue, and for other purposes,*" approved February 24, 1919 (40 Stats. 1065), under the title "Gross Income Defined," provides that

"for the purposes of that title *gross income includes* gains, profits, and income derived from *salaries*, wages and compensation for personal services (*including in the case of the President of the United States, the judges of the supreme and inferior courts of the United States* * * * *the compensation received as such*) of whatever kind and in whatever form paid * * * and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer," etc.

There could be no doubt that Congress thereby intended to impose income taxation on the "*compensation received as such*" of the judges; and, under the express requirement of this provision, the plaintiff, in his individual Income Tax Return for the year 1918, included the sum of \$6,000.00, the compensation and salary which, during that year, had been paid to him under the law of the United States as the United States District Judge for the Western District of Kentucky, which office he had held and the duties of which he had discharged during that entire year, as also he had done during many previous years.

Upon the face of that return he protested against being required to include therein his compensation as Judge upon the ground that the Act requiring it was violative of the CONSTITUTION of the United States. This return showed that, allowing all the deductions permitted by said Act, the normal tax on plaintiff's compensation as such Judge was \$192.90 and the sur-tax thereon was \$83.57, a total of \$276.47 for the taxable year 1918.

This return was made and delivered to the defendant, who was then the Deputy and Acting Collector of Internal Revenue for the Fifth District of Kentucky, on March 12, 1919, at which time plaintiff paid to him the sum of \$276.47 in full of the taxes

on plaintiff's compensation as such Judge. In thus paying in full he exercised the option given him by Section 250a of the Act.

At the time of making the payment plaintiff delivered to the defendant a statement in writing informing him that the payment was made under protest and that plaintiff would sue him (the Deputy and Acting Collector) for the recovery of the amount paid with interest from the date of payment. This protest is set out in full in plaintiff's petition, and stated the ground thereof to be that the statute under which the taxation is imposed and collected is, so far as that taxation is laid on the compensation of the judges, violative of Article 3, Section 1, of the CONSTITUTION of the United States.

To meet the provisions of Section 3226 of the Revised Statutes (Section 5949 of the Compiled Statutes, 1916, Vol. 6), the plaintiff, on March 18, 1919, in due form made an appeal in the only admissible way, namely, on Form 46, to the Commissioner of Internal Revenue under Section 1316 of the said Act (40 Stats. 1145) which amends Section 3220 of the Revised Statutes (Section 5944, Comp. Stats. 1916) for the refunding to him of the amount so paid as income taxation on his "compensation received as such," to wit, \$276.47, and supported the same with

clear and explicit proof of the facts upon which the refunding of the \$276.47 was sought.

On September 9, 1919, this application was wholly denied by the Commissioner of Internal Revenue.

Under these circumstances this action was brought by the plaintiff against the defendant, who received payment of said taxes and who, personally, is protected from loss by Section 1316 of the Act.

The defendant has filed a general demurrer to the petition, the facts stated therein being undeniable.

The Proper Procedure.

That this is the proper mode of procedure is established by so many authorities as to be familiar. (*Patten v. Brady*, 184 U. S. 614, and *Pacific Whaling Co. v. United States*, 187 U. S. 452-3.)

Mr. Justice WHITE succinctly stated it in his dissenting opinion in *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 609, where he said:

“The decisions of this court hold that the collection of a tax levied by the government of the United States will not be restrained by its courts. *Cheat-ham v. United States*, 92 U. S. 85; *Snyder v. Marks*, 109 U. S. 189. See also *Elliott v. Swartout*, 10 Pet. 137; *City of Philadelphia v. The Collector*, 5 Wall. 720; *Hornthall v. The Collector*, 9 Wall. 560. The same authorities have established the rule that the proper course in a case of illegal taxation is to pay

the tax under protest or with notice of suit, and then bring an action against the officers who collected it. The statute law of the United States, in express terms, gives a party who has paid a tax under protest the right to sue for its recovery. Rev. Stats. Sec. 3226."

The Constitutional Question Involved.

The provisions of Section 213 of the Act of February 24, 1919, are plain and clear in their requirements that all judges of the Supreme and inferior courts of the United States (1) shall respectively include the amount of their "compensation received as such" in their income tax returns "for the taxable year in which received by the taxpayer," and (2) shall pay to the Collector of Internal Revenue the income tax imposed thereon by Section 210 of the Act.

The one question sought to be settled in this suit is whether or not those requirements of the Act are violative of the CONSTITUTION of the United States.

The importance of this question is manifest not, of course, from the somewhat negligible amount of money sought to be recovered but from the vital nature of the constitutional principle at stake. If, in this commercial age and amidst disintegrating tendencies which must be held in check, that principle (so clearly expounded, as we shall see, in No. 79 of

the Federalist) is worth less to this country and her people than the relatively small amount of money to be obtained from income taxation on judicial salaries, it is not worth the trouble of this effort for its vindication, and this suit had as well be dismissed upon the idea *de minimis non curat lex*; but, otherwise, it is worth all the labor that can be bestowed upon it, to say nothing of any cost that may be incurred. The essential character of that principle, so far as now involved, has been, as all ought to know, exalted to a place second to none in importance by our most eminent jurists and writers on the CONSTITUTION. Upon the same grounds its support is now sought at a time and in a state of general unrest when constitutional obligations should in no way be regarded as something to be cast into the discard.

Article 3, Section 1, of the CONSTITUTION as proposed by the Convention which framed it, and as it was adopted by the people of the Federation, is as follows:

“The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services, a Compensation which

shall not be diminished during their Continuance in Office."

This provision is the chief corner stone of that judicial system which the Bar, as well as intelligent men generally, have been accustomed to venerate and uphold as the independent and impartial guardian of the rights of all the people.

It means that the compensation of a Judge shall not at any time nor in any way directly or indirectly, be reduced ~~before he has taken his oath of office~~ *during his continuance in office*, though, of course, it does not apply to such burdens thereon as had been imposed before his appointment, for, in that event, he would take *cum onere* and with his eyes open as to such previously existing laws. Any anomaly resulting is for congressional consideration.

When the adoption of the CONSTITUTION was under discussion by the great men to whom this nation and indeed the whole world are so much indebted, few of its Articles were nearer their hearts than was the one just copied. This was so in a somewhat special sense, inasmuch as the independence of the Judiciary and the means for making it so, namely, *first*, by a permanency of official tenure, and *second*, by an undiminishable compensation, were thereby provided.

It fell largely to ALEXANDER HAMILTON, one of the

greatest intellects of all time, to explain and uphold both of those propositions. After discussing in No. 73 of the Federalist with great power, the provision of the CONSTITUTION concerning the undiminishable compensation of the President (much of what he then said being quite as applicable here), he, in No. 78, took up the question of the permanency of the official tenure of the Judges, and demonstrated the indispensable necessity for that to be guarded; and in No. 79, came to the question involved in the last clause of Article 3, Section 1, which here has the most pertinent application, and said:

“Next to permanency in office, nothing can contribute more to the independence of the Judges, than a fixed provision for their support. The remark made in relation to the President, is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resource on the occasional grants of the latter. The enlightened friends to good government, in every state, have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the Judges; but the experiment has in some instances shown, that such expressions are not sufficiently definite to preclude legislative evasions.

Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided, that the Judges of the United States 'shall at *stated times* receive for their services a compensation, which shall not be *diminished* during their continuance in office.'

"This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate.

"It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions *as to put it out of the power of that body to change the condition of the individual for the worse.*

"A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular Judge comes into office, in respect to him.

"It will be observed that a difference has been made by the convention between the compensation of the President and of the Judges. That of the former can neither be increased *nor* diminished. That of the latter can only not be *diminished*. This

probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the Judges, who if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

“This provision for the support of the Judges bears every mark of prudence and efficiency; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regard to their own judges.”

Mr. Justice STORY, in his Commentaries on the CONSTITUTION, Section 1629, 1630 and 1631, has inserted in full all that we have just copied from the Federalist; preceding it, in Section 1628, with this strong statement:

“The next clause of the constitution declares, that the judges of the supreme and interior courts ‘shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.’ Without this provision the other, as to their tenure of office, would have been utterly nugatory, and indeed a mere mockery. The Federalist has here also spoken in language so di-

rect and convincing, that it supersedes all other argument."

In 1st Kent's Commentaries, star pages 293-4, it was said by the great chancellor that—

"In monarchical governments, the independence of the judiciary is essential to guard the rights of the subject from the injustice of the crown; but in republics it is equally salutary, in protecting the Constitution and laws from the encroachments and the tyranny of faction. Laws, however wholesome or necessary, are frequently the object of temporary aversion, and sometimes of popular resistance. It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts; and to deal impartially and truly, according to law, between suitors of every description, whether the cause, the question, or the party be popular or unpopular. To give them the courage and the firmness to do it, the judges ought to be confident of the security of their salaries and station.

"Nor is an independent judiciary less useful as a check upon the legislative power, which is sometimes disposed, from the force of party, or the temptations of interest, to make a sacrifice of constitutional rights; and it is a wise and necessary principle of our government, as will be shown hereafter in the course of these lectures, that legislative acts are subject to the severe scrutiny and impartial interpretation of the courts of justice, who are bound to regard the Constitution as the paramount law, and the highest evidence of the will of the people.

"The provision for the permanent support of the

judges is well calculated, in addition to the tenure of the office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution of the United States, on this subject, was an improvement upon all our previously existing constitutions."

The subject came before the Supreme Court somewhat incidentally in the case of *Benedict v. United States*, 176 U. S. 357, and in its opinion, at page 360 of the report, it was said:

"The case in reality turns upon the meaning of the word 'salary,' as used in Section 714. The word 'salary' may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered. *Thompson v. Phillips*, 12 Ohio St. 617; *Landis v. Lincoln County*, 31 Oregon 427; *Dane v. Smith*, 54 Alabama 49; *State v. Murphy*, 24 Florida 33; *Castle v. Lawler*, 47 Conn. 345; *Commonwealth v. Butler*, 99 Penn. St. 542. As applied to District Judges in general, and indeed to every District Judge except the Judge of the Eastern District of New York, it doubtless refers to the salary of \$5000 fixed by the act of February 24, 1891. Such salary is an annual stipend, payable in sickness as well as in health, for duties much more onerous in some districts than in others, and regardless of the fact whether such duties are performed by the Judge in person, or by the Judge of another district called

in to take his place. It is a compensation which can not be diminished during the continuance of the incumbent in office, and of which he can not be deprived except by death, resignation or impeachment."

See also Tucker on the Constitution of the United States, Vol. 2, Section 364.

The Constitution of Kentucky has provisions forbidding the diminution of the salaries of several classes of officers, including the judges of the State, and strong opinions upholding and enforcing those provisions may be found referred to and some of them discussed in the elaborate opinion of the Court of Appeals in *Greene v. Cohen*, 181 Ky. 108.

That the power to tax implies the power to destroy is a proposition of the utmost importance in this connection, and has probably never been disputed since CHIEF JUSTICE MARSHALL, in delivering the opinion of the Court in *McCulloch v. Maryland*, 4 Wheaton, 316, 431, said:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create, * * * are propositions not to be denied."

DOES THE TAXATION IMPOSED ON JUDICIAL SALARIES DIMINISH THE COMPENSATION OF THE JUDGES?

This is the fundamental question involved. If it be answered in the negative it may end this case, but if in the affirmative, then, upon grounds presently to be stated, effective operation of Section 1 of Article 3 of the CONSTITUTION is thereby insured against any influence the SIXTEENTH AMENDMENT might otherwise have.

It is obvious that diminution may be brought about in more ways than one. Some of those ways may be open and direct, while others, equally effective, may be indirect. Each, however, will accomplish the same result and eventually *that result* must supply the test of whether or not there has been diminution.

A statute might in express terms lower a judge's salary as then fixed. That, palpably, would diminish it and thus clearly bring the legislation within the constitutional inhibition. The compensation of the judges is fixed at a stated amount which is made payable annually in twelve monthly installments. Payment of the taxes laid thereon becomes an obligation of the judge to the Government *eo instanti* the monthly installment of compensation is paid to him

by the United States, and the same accumulative result follows payment of each installment in succession throughout the year.

If a judge should die or resign, the obligation to pay those taxes in respect to each installment of salary theretofore paid to him, continues.

All this is true although the *collection* of what is due under the previously and successively fixed obligations to pay the taxes, is postponed until the yearly income is fully ascertained a few months afterwards by the return of the taxpayer. All the taxation which at once rests upon each one of the installments when it is paid simultaneously creates an obligation to pay money which must ultimately come into the Treasury of the United States; and the result will be, in the case of a District Judge, that in 1918, he realized not the fixed compensation of \$6,000, but that sum so reduced by the taxation *expressly laid thereon*, as to amount, say, to only about \$5,700. The result is the same, namely, a diminution of the compensation of the Judge "during his continuance in office" whether it was lowered (a) in express terms or (b) by taxation expressly imposed thereon as such. And is it not indeed manifest that the taxation laid and collected by the United States *itself* upon the compensation as such which *it* pays to the Judge, *is* a diminution of that compensation—

the taking back from the Judge a little later by one hand of a part of what had been paid to him with the other? The actual payment in cash by the taxpayer of the amount of the taxes expressly imposed on his compensation as such, *demonstrates* that there has thereby been a diminution thereof, while the *ingenuity* of the advocate can only plausibly *theorize* that there was none.

Income taxation upon the compensation of the Judges imposed by Sections 210 and 213 (we can hardly repeat too often) is expressly and in the most explicit terms laid upon that very compensation for the year in which it was received, and that it is thereby diminished is certain. That this is the correct view, seems not only to be self-evident (which makes it difficult to add to its clarity), but it is supported by the most noted jurists and writers. However, before quoting from them we may earnestly insist that "deducting" the amount of the taxation from the compensation *before* its payment (as provided in former laws) was in no way different in its result from the *return to the United States under compulsion* of part of that compensation *after* it had been paid.

The opinion of Attorney General Hoar in 1869 (Volume 13, Opinions of the Attorney General, page 161) discussed the provisions of the Act of March 2,

1867, found in 14 Stats., page 478, and explicitly advised the Secretary of the Treasury that the taxation thereby imposed, if exacted on judicial salaries would be in plain violation of Section 3, Article 1, of the CONSTITUTION, and could not be sustained because such taxation clearly involved a diminution of the compensation of the Judges.

In his opinion, page 162, it was said:

“A specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would, by law, be payable as such salary, is, in my opinion, a diminution of the compensation to be paid to him, which, in the case of the President and the judges, would be prohibited by the Constitution of the United States, if the Act of Congress levying the tax were passed during the official term of the President or of the judges respectively concerning whom the question should arise.

“It was held in the case of *Dobbins v. The Commissioners of Erie County* (16 Pet. 435), that the compensation of an officer of the United States, fixed by a law of Congress, was not subject to taxation under State authority, because the effect of such a tax would be to diminish the compensation which the officer was by law entitled to receive. Such a tax was held to interfere with the provision made by the United States for the due execution of the powers and functions of the National Government by means of officers which it appointed and paid. In the case of *The Pacific Insurance Company v. Soule*, (7 Wall. 434) it was decided that an income

tax was an excise or duty imposed by a statute of the United States relating to internal revenue.

Congress, being prohibited by the Constitution from diminishing the salaries to be paid to the judges of the Supreme Court and the President during their respective terms of office, can no more do it by levying an excise or duty upon those salaries and deducting the amount thereof from them, than could a State from that of an officer of the United States under the doctrine of the case in 16 Peters' Reports. The tax directly operates as a diminution of the compensation of the officer.

"I am, therefore, of opinion that no income tax could be lawfully assessed and collected upon the salaries of the President or any of the Judges who were in office at the time the statute imposing the tax was passed."

The Act then under discussion was, in terms, different from that of February 24, 1919. Under it, the tax on official salaries was collected at the source, by withholding it when each installment of compensation was paid, while in the last Act the income taxation is laid on the judge's "compensation received as such," and its collection is enforceable through penalties prescribed for failure to pay promptly.

In 131 N. C. 693 there is reported a certain letter written by the Chief Justice of that State to the Attorney General thereof and the reply of the latter thereto. They are to be found on pages 693 to 701 inclusive in

**“The Matter of the Taxation of the Salaries of Judges.”
(131 N. C. 693).**

In the quite elaborate letter of the Attorney General we find reference to many cases, among them *McCulloch v. Maryland*, 4 Wheaton 316, *Commonwealth v. Mann*, 5 Watts and Sargeant 403, and on page 699 he says:

“The Federal Constitution contains a provision similar to that appearing in the Constitution of our own State—that the salaries of the judges shall not be diminished during their continuance in office. Under an act of Congress, imposing a tax of three per cent on the salaries of all the officers in the employment of the United States Government, the Treasury Department held that judicial officers were embraced within its terms. On February 16th, 1863, Judge Taney, who was then Chief Justice of the Supreme Court of the United States, addressed a letter to the Honorable, the Secretary of the Treasury, and from it the following paragraph is taken: ‘The act in question, as you interpret it, diminishes the compensation of every judge three per cent; and if it can be diminished to that extent by the name of a tax, it may, in the same way, be reduced, from time to time, at the pleasure of the Legislature.’

“It is true that the act of Congress, passed upon by Chief Justice Taney, as well as in the case of *Commonwealth v. Mann*, 5 Watts and Sargeant, page 403, cited by Attorney General Bachelor (Appendix, 48 N. C. Report), the tax levied was deducted from the compensation fixed by law and retained in the Treasury. But in what way the method of collecting

the tax imposed upon the salary affects the question involved, I am utterly unable to perceive. The principle announced by Chief Justice Taney, as well as the Supreme Court of Pennsylvania, in *Commonwealth v. Mann, supra*, operates upon the power to tax, and not upon the incidental means employed to collect."

The letter of CHIEF JUSTICE TANEY is printed in full in the Appendix to 157 U. S. In it, among other things, it was said:

"The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

"The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislature and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value

without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.”

Very striking comments (evidently of high approval) were made upon this letter by Mr. Justice FIELD in his separate opinion in *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 605, 606. Equally approving was what he then said on pages 606 and 607 about Attorney General Hoar's opinion. The remarks of the Justice respecting the latter contained this statement:

“I am informed that it has been followed ever since without question by the Department supervising or directing the collection of the public revenues.”

And so it continued for half a century, and until the Great War was supposed to supply a plausible excuse for changing back to that which CHIEF JUSTICE TANEY and Attorney General Hoar had found to violate the Constitution of the United States.

ATTORNEY GENERAL PALMER'S OPINION.

The fact has not been overlooked that the present distinguished ATTORNEY GENERAL, on May 6, 1919, in an opinion given to the Secretary of the Treasury, has taken the position that the legislation impugned in this suit is not violative of the CONSTITUTION, and

has thus brought himself in direct conflict with all the great authorities we have cited.

In that situation it might be better to let his argument be met and confuted by those authorities as well as by the explicit provisions of the CONSTITUTION itself, when compared with the plain words of the Act, both of which we have copied, and especially as a careful analysis of the opinion in each of the cases cited by the ATTORNEY GENERAL seems clearly to show that with four exceptions no one of them appears definitely to bear upon the one constitutional question involved here.

Those exceptions are, *first*, *Peck & Co. v. Lowe, Collector*, 247 U. S. 165, 172-3, which is one of the strong and direct authorities hereinafter cited in support of the proposition that the 16TH AMENDMENT can in no way justify or support that provision of the revenue Act, the constitutionality of which is now in question.

A *second* is *City of New Orleans v. Lea*, 14 La. An. 194, which explicitly holds, as shown by the syllabus and as abundantly supported by the text, that article 75 of the Constitution of Louisiana, which, in language quite similar to that of the CONSTITUTION of the United States, provides that "the judges, both of the supreme and inferior courts shall at stated times receive a salary which shall not be diminished

during their continuance in office," *exempts the salary of a judge from taxation because* it would be thereby diminished.

A *third* is *State v. Nygaard*, 159 Wis. 396. There a judge of one of the lower courts of the State had raised the question of the constitutionality of a statute under which his salary for 1912 had been subjected to taxation in 1913. The determination of the question rested upon the constitution of the State alone. There were *three* provisions which had to be considered together. One of them was in this language:

"Nor shall the compensation of any public officer be increased or diminished during his term of office."

Another was that

"the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe,"

And the third was the amendment to the constitution adopted in 1908 in this language:

"Taxes may also be imposed on income, privileges and occupations, which tax may be graduated and progressive, and reasonable exemptions may be provided."

It was upon the *construction* by the Supreme Court of Wisconsin of these three provisions *taken together* that the taxation was upheld. That case

differed widely from this, if in no other respect, that there is no provision in the Constitution of the United States requiring *uniformity* in "*taxation*," though there is such a rule respecting "duties, imports and excises." (Art. 1, Sec. 8.) This fact will no doubt be regarded as most important when Article 3, Section 1 of the CONSTITUTION is to be construed.

The *fourth* and last of the exceptions referred to is the case of *Commissioners v. Chapman*, 2 Rawle (Pa.) 73, which does support the ATTORNEY GENERAL'S view. It was decided in 1829, but it appears to be certain that while that case is not mentioned, the doctrine it announced was overruled by the decision in the case of *Commonwealth v. Mann*, 5 Watts & Sargeant 403, decided in 1843, in which it was explicitly held that the legislature *did not have the constitutional power to diminish by taxation the compensation fixed by law for the judges* of the Common Pleas Court during their continuance in office—exactly the same proposition decided the other way in the earlier case. The comments on the last named case by the Superior Court and by the Supreme Court of Pennsylvania, in their opinions in the case of *Commonwealth v. Mathues*, 210 Penn. 394, 395, 399 and 423, indicate how certainly the ruling in the *Mann* case was approved by both, and how thor-

oughly the *Chapman* case has been *discredited* in the jurisprudence of Pennsylvania.

We may, however, add that apart from the 16TH AMENDMENT, which will be discussed further along, the ATTORNEY GENERAL'S view appears to be that the income taxation expressly imposed upon that "compensation received as such" for the taxable year in which it is earned, does not diminish it, because payment of the taxation is exacted *after* all the compensation has been received. But the door, if thus left open, would admit anything, and upon grounds already stated, it cannot be that that mere succession of events can fairly be determinative of the question, for probably all "income taxes," as distinguished from "duties, imports and excises" as defined in *Pacific Insurance Co. v. Soule*, 7 Wallace 445, are payable *after* the taxable year's income from all sources has been shown by the taxpayer's return. Then the taxation rests upon the income thus ascertained, including, in the case of a Judge, his compensation received as such.

Under the revenue act of July 1, 1862 (12 Stats. 472), income taxes on judicial salaries were attempted to be retained by the Treasury Department itself out of each installment paid. Here the taxation is not seized *in advance*, as was then done, but

is exacted, *under threat of penalties*, within about two and a half months *after* the close of the taxable year. The Judge must either hoard enough to meet the demand to come in March of the next year for the taxes imposed on his salary paid in installments during the previous year or he must meet the demand out of the next year's salary. The Constitution says nothing about *yearly* compensation, but says generally that the compensation of a Judge shall not be reduced at all (meaning at any time or in any way) "*during his continuance in office.*"

There are, speaking generally, only two periods when the collection of income taxes imposed by law is possible—one being at the various times when the income is received, and the other being at a time after the whole taxable year's income has been ascertained. In either case, however, the tax is directly imposed upon *that* year's earnings, whether its collection is enforced as the income is received or within the short period fixed by law after the taxable year's income has been made to appear by the return. In either case, the taxation thereon equally and inexorably rests upon and diminishes the compensation of the Judge. Any other conclusion would seem to be illogical if not somewhat strained.

Besides, the ATTORNEY GENERAL'S view ignores the fact we have mentioned, that payment of the taxes

must be promptly provided for, year by year, out of the money received by the Judge "during his continuance in office." No one contends, if any of a Judge's compensation *itself* earns other income, that the latter may not be taxed, but the judicial compensation earned by the Judge himself cannot be diminished by taxation imposed by Congress.

Furthermore, in the opinion of the ATTORNEY GENERAL it is stated that:

"The Revenue Act does not lay a tax on these incomes because of their source or in any discriminative way. The tax is laid on them just as it is laid on other income. The tax is not laid on the salaries as such. It does not necessarily apply to the whole of the salaries received."

The statements in the two last sentences appear to be made despite the very clear provisions of Sections 213 defining "gross income," and which, though inserted at the outset, are copied again with some italics of our own, as follows:

"For the purposes of that title gross income includes gains, profits, and income derived from salaries, wages and compensation for personal services (including in the case of the President of the United States, *the judges of the supreme and inferior courts of the United States* * * * *the compensation received as such*) of whatever kind and in whatever form paid * * * and income derived from any source whatever. *The amount of all such items*

shall be included in the gross income for the taxable year in which received by the taxpayer."

We conclude there must have been misapprehension as to the italicized parts of the statute when the two sentences referred to were written by the ATTORNEY GENERAL.

THE SIXTEENTH AMENDMENT.

In his opinion the ATTORNEY GENERAL said:

"The sections of the Constitution involved in an answer to your questions are: (1) Article 1, Section 8. 'The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, * * *.'

"(2) The Sixteenth Amendment, which is as follows: 'The Congress shall have power to lay and collect taxes or incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.'

"Under these provisions, it can not be doubted that Congress may levy an income tax on all incomes received from any source unless the broad power thus conferred is limited by some other provisions of the Constitution. The only other provision which can, by any possibility, affect the right to include the salaries of the officials mentioned in their gross incomes for the purposes of taxation are the following, viz: Article 2, Section 1, forbidding the diminution of the President's salary, and Article 3, Section 1, forbidding the diminishing of judicial salaries."

And, he continues,

“The question is, whether these sections so limit those conferring the tax power that Congress is not only denied the right to directly diminish the compensation of these officials during their respective terms, but is also without power to so frame a general income tax law that the undiminished compensation so received shall be taken into consideration in determining the amount of tax they shall pay.”

The ATTORNEY GENERAL further says:

“In the present inquiry, since the Sixteenth Amendment merely removed a restriction as to the manner of levying taxes on certain kinds of incomes, the inhibition against diminishing salaries and the authority to levy taxes on incomes must be regarded as contained in the same instrument. The question is whether there is such conflict between them as that the one must be regarded as a limitation upon the other.”

Upon these statements there appears to be no doubt that the sole basis of his opinion is that the 16TH AMENDMENT is the one constitutional provision which removes all difficulty and authorizes the taxation imposed by the revenue Act on the compensation as such of the Judges, notwithstanding the provisions of Section 1 of Article 3 of the Constitution which otherwise would forbid it.

We had supposed the opposite conclusion was altogether inevitable from the decisions in *Brushaber v.*

Union Pacific R. R. Co., 240 U. S. 1, 12, 27, and in *Peck & Co. v. Lowe, Collector*, 247 U. S. 165, and that further discussion on this phase of the case would hardly be necessary. But in view of what the ATTORNEY GENERAL has said, we shall go into the question at some length, especially, as in the debates while the Act was under consideration, there was a contention by some members of Congress to the effect that the taxation of judicial salaries has constitutional warrant in the 16TH AMENDMENT, which, it was contended, authorizes taxation upon incomes "from whatever source derived"; and if the adoption of that Amendment had no history, and if there were no other words in it, there possibly might be some force in the suggestion. It will be recalled, however, that practically similar language was used in what was our first income tax law, the Act approved August 5, 1861 (12 Stats. p. 309), in its successor, the Act approved July 1, 1862 (12 Stats., p. 473, and in the Act approved March 2, 1867 (14 Stats., p. 478).

Article 1, Section 9, Clause 4, of the CONSTITUTION, reads as follows:

"No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken."

This provision of the CONSTITUTION and a judicial

inquiry (*Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, S. C. 158 U. S. 601) into the constitutionality of a statute which ignored it, furnished the occasion for the 16TH AMENDMENT; and the next question to be discussed is, Did that Amendment authorize income taxation on the compensation of the Federal Judges, notwithstanding that provision of Article 3, Section 1, of the CONSTITUTION which expressly prohibits any diminution thereof by any legislation enacted during a judge's continuance in office.

The determination of this question from this standpoint must be reached through the application of rules of interpretation established by decisions of the Supreme Court and which have been so clearly and distinctly stated by it as to admit of no dispute.

In August, 1894, "*An Act to reduce taxation, to provide revenue for the Government, and for other purposes*," (the Wilson Bill), became a law without the approval of the President. Among other things it provided (28 Stats. 553) for certain forms of income taxation, namely, 1st, a tax on the rents or income from real estate, and, 2nd, a tax on income derived from interest received on bonds issued by municipal corporations, all without compliance with that clause of the CONSTITUTION which provides that "No capitation, or other direct Tax, shall be laid, unless in Proportion to the Census or Enumeration

hereinbefore directed to be taken." (Art. 1, Sec. 9, Clause 4.)

The case of *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, was brought to test the constitutionality of those and other provisions of the Act. After most elaborate argument by counsel, and upon great consideration, the Supreme Court held that the Act, so far as it involved the validity of the income taxes above indicated, was unconstitutional upon the ground that they were direct taxes not laid in proportion to the census enumeration. This result, based upon that ground, created the entire situation which the 16TH AMENDMENT was designed to remedy, and led to the insertion therein of such words only as were required to so modify Clause 4, Section 9 of Article 1 of the CONSTITUTION as to meet that situation. That clause of the CONSTITUTION relates solely to capitation and direct taxes and *not* to the wholly unrelated Article 3, Section 1, which established and provided for a totally *different* thing, namely, the protection and independence of the judiciary.

Indeed it seems well nigh impossible to say, or to suppose, that anything except the defect developed by the *Pollock* case, in Clause 4, Section 9 of Article 1 of the CONSTITUTION, was in the mind either (a) of Congress, or (b) of the Legislatures, or (c)

of the people when they selected the Legislatures of the several States, and when the latter respectively considered the necessity for the 16TH AMENDMENT. And in view of actual historical facts, it manifestly would involve an immense strain on the probabilities to say that either Congress, or the people, or the Legislatures thereby intended to nullify that part of Article 3, Section 1, of the CONSTITUTION which, upon grounds of the greatest importance, forbids the diminution of the salaries of the judges during their continuance in office.

The wisdom—indeed, the necessity—of the latter clause had been urged and extolled in its making and ever since. In the preceding century and more no complaint of it had been agitated. The 16TH AMENDMENT was never intended to impair or destroy it, and especially not by such a “stealthy encroachment” upon it as would be involved in the supposition that the courts, despite all historic facts, are now REQUIRED TO MAKE ANY CONSTRUCTION WHICH WOULD NOT LEAVE BOTH THAT PROVISION AND THE 16TH AMENDMENT CO-EXISTENT AND IN FULL FORCE—THE LATTER OPERATING ENTIRELY OUTSIDE THE FORMER.

This view seems to be emphasized and made clear by the use in the Amendment of the explanatory and qualifying words, “without apportionment among the several States and without regard to any Census

or Enumeration," the presence of which feature in the CONSTITUTION and its absence from the legislation of 1894 being the sole basis of the decision in the *Pollock* case.

At last, the *intention* of the makers of the 16TH AMENDMENT is the important thing to be considered in construing it, and the historical facts to be referred to appear to be not only persuasive, but altogether conclusive that the Amendment was not intended to give permission to tax judicial salaries and thereby diminish them.

In this connection it may be well to insert one apposite paragraph from the opinion in the *Pollock* case, 157 U. S. at page 558, where it was said:

"The first question to be considered is whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution. * * * But in arriving at any conclusion upon this point, we are at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other."

Also another from the opinion of the Court in *Knowlton v. Moore*, 178 U. S. at page 95, where it was said:

"The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were set-

tled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to correctly interpret its meaning. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 558."

And yet another from the Court's opinion in the *Debs* case, 158 U. S., where, at page 594, it said:

"We fully agree with counsel that 'it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts,' and we reaffirm the declaration made for the court by Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635, that 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.' "

Furthermore, in *Prout v. Starr*, 188 U. S., at pages 543-4, the Court strongly illustrated the situation now involved when it most distinctly said:

"The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. * * *

"It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."

A narrative of the generic facts to which the fore-

going principles are to be applied in this instance becomes most important.

Before proceeding with that narrative, however, it may somewhat illumine its lesson to bear in mind that Article 1 of the CONSTITUTION is the most elaborate of all. It creates the Legislative Department of the Government and largely defines and limits its powers. Section 9, Clause 4, of that Article said to Congress that "no capitation, or other direct tax, shall be laid, unless in proportion to the Census or Enumeration hereinbefore directed to be taken."

Article 2 creates the Executive Department, and is, though elaborate, less so than Article 1.

Article 3 is quite brief, but its first section contains the provision which reads:

"The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

The difference between these provisions, and especially between those of Articles 1 and 3—one pertaining to the Legislative Department and its functions, the other to the Judicial Department and its stability—is very great, and while every provision of the CONSTITUTION is highly important, the objects of those two are about as far apart as possible.

This circumstances may aid when considering how the historical facts about to be stated can properly affect the rules for construing the CONSTITUTION already cited from the decisions of the Supreme Court.

HISTORY OF THE SIXTEENTH AMENDMENT.

The *Pollock* case was decided on April 8, 1895, and there the matter rested until the beginning of the administration of President Taft in March, 1909. The situation was then such as to induce him to call a special session of the 61st Congress; and when it convened, there began consideration of the bill ultimately known as the Payne-Aldrich Tariff Bill, the discussions upon which developed that the decision in the *Pollock* case would prevent, in large measure, the enactment of efficient income tax legislation. Some desired to attempt by legislation to evade or disregard that decision, but wiser counsels prevailed. On June 16, 1909, the President sent to Congress a special message which was printed in full in the Congressional Record (1st Sess., 61st Cong., 3344-3708), and also as Senate Document 98, 61st Congress. In that message the President said:

“The House of Representatives has adopted the suggestion and has provided in the bill it passed for the collection of such a tax. In the Senate the action of its Finance Committee and the course of the debate indicate that it may not agree to this provision,

and it is now proposed to make up the deficit by the imposition of a general income tax, in form and substance of almost exactly the same character as that which in the case of *Pollock v. Farmers' Loan and Trust Company* (157 U. S. 429) was held by the Supreme Court to be a direct tax, and therefore not within the power of the Federal Government to impose unless apportioned among the several States according to population. This new proposal, which I did not discuss in my inaugural address or in my message at the opening of the present session, makes it appropriate for me to submit to the Congress certain additional recommendations.

“The decision of the Supreme Court in the income-tax cases deprived the National Government of a power which, by reason of previous decisions of the court, it was generally supposed that Government had. It is undoubtedly a power the National Government ought to have. It might be indispensable to the nation's life in great crises. Although I have not considered a constitutional amendment as necessary to the exercise of certain phases of this power, a mature consideration has satisfied me that an amendment is the only proper course for its establishment to its full extent. I therefore recommend to the Congress that both Houses, by a two-thirds vote, shall propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the States in proportion to population.

“This course is much to be preferred to the one proposed of re-enacting a law once judicially declared to be unconstitutional. For the Congress to assume that the court will reverse itself, and to enact

legislation on such an assumption, will not strengthen popular confidence in the stability of judicial construction of the Constitution. It is much wiser policy to accept the decision and remedy the defect by amendment in due and regular course."

In June, 1909, a joint resolution proposing a 16TH AMENDMENT to the Constitution precisely in the form in which it was adopted by the States was reported to the Senate by the Finance Committee through Senator Aldrich, its chairman. The report was very brief and not reduced to writing. Senator Aldrich thereupon moved that the report be adopted unanimously by the Senate, but other Senators desired to couple with it another constitutional amendment on a different subject, and some debate followed upon the latter proposition rather than upon the first. However the proposition to couple another amendment was declared out of order, and on July 3, 1909, the joint resolution proposing the 16TH AMENDMENT for adoption by the States was unanimously agreed to by the Senate. (See Cong. Rec., 61st Cong., pp. 3900, 4108 to 4120.)

The joint resolution had been considered by the Ways and Means Committee of the House and its report was as follows:

"The Committee on Ways and Means, to whom was referred the resolution (S. J. Res. 40) proposing an amendment to the Constitution of the United

States, having had the same under consideration, report it back to the House without amendment and recommend that the resolution do pass.”

On July 12 or 13, 1909, the House of Representatives by a nearly unanimous vote adopted the joint resolution after much debate. In neither House of Congress was the proposition considered to be sufficiently difficult to require consideration by its Judiciary Committee.

Neither in the President's message nor in the report either of the Senate or of the House committee by which the subject had been considered, nor in the debates in either House of Congress, had Article 3, Section 1, of the Constitution been alluded to. Article 1, Section 9, Clause 4, of the Constitution, and the *Pollock* case, which construed it, presented the whole difficulty to be remedied. From all these circumstances, we repeat, it is clear that at no time was anything in the contemplation either of the President, who recommended it, or of the Congress which proposed it, or of the States which adopted the 16TH AMENDMENT, except the necessity for remedying the defect in Article 1, Section 9, disclosed by the decision in the *Pollock* case, namely, apportionment among the States upon the census. That being the sole object to be accomplished, the 16TH AMENDMENT devised the means to that end. And on its face it

explains that to be the fact when the light of its history is thrown upon it.

And that this is the correct view was put beyond dispute by the decision of the Supreme Court in *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 12, 17. In that case CHIEF JUSTICE WHITE, in delivering the opinion of the court, said:

“This is the text of the Amendment:

“‘The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.’

“It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed in the light of the history which we have given and of the decision in the *Pollock* case and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock* case was decided, that is, of determining whether a tax on income was direct and not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the bur-

den which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment. From this in substance it indisputably arises, first, that all the contentions which we have previously noticed concerning the assumed limitations to be implied from the language of the Amendment as to the nature and character of the income taxes which it authorizes find no support in the text and are in irreconcilable conflict with the very purpose which the Amendment was adopted to accomplish."

And in *Peck & Co. v. Lowe, Collector*, 247 U. S. 165, 172-3, speaking through Mr. Justice VAN DEVANTER, the Supreme Court held that:

"The Sixteenth Amendment, although referred to in argument, has no real bearing, and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power to new or excepted subjects, but merely removes all occasion, which otherwise might exist, for an apportionment among the States of taxes laid on income, whether it be derived from one source or another. *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 17-19; *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 112-113."

This being the settled construction of the SIXTEENTH AMENDMENT, it stands before the court as though that construction were a part of the Amendment itself. Section 1 of Article 3 of the CONSTITUTION is at least of equal dignity with the Amendment.

This being so, there comes into view a proposition stated by Mr. Justice HARLAN in delivering the opinion of the court in *Dick v. United States*, 208 U. S., where, at page 353, the learned Justice, in speaking of the two constitutional principles then involved, said:

“These fundamental principles are of equal dignity and neither must be so enforced as to nullify or substantially impair the other.”

Here there are three provisions of the CONSTITUTION which may be considered, namely, *first*, Clause 1, Section 8 of Article 1, not relied upon in the opinion of the ATTORNEY GENERAL otherwise than in connection with the SIXTEENTH AMENDMENT, but which gives Congress general power to lay and collect taxes; *second*, Section 1, Article 3, which forbids the diminution of the compensation of the Judges during their continuance in office, and, *third*, the SIXTEENTH AMENDMENT, the reach of which is stated in *Brushaber v. Union Pacific R. R. Co.*, 240 U. S., and in *Peck & Co. v. Lowe*, cited *supra*. This makes it appropriate to restate the proposition so clearly expressed by the Supreme Court in *Pollock v. Farmers' Loan and Trust Co.*, that

“it is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed.”

The argument made by the present learned ATTORNEY GENERAL could be used either for the nullification or the great impairment of Section 1 of Article 3, and the suggestion is respectfully submitted, in view of the great purposes of that Section, that in interpreting it all doubts should be resolved in favor of a construction which would avoid that result and balk any attempt in that direction under the specious guise of taxation. Unless the fathers were mistaken in their estimate the constitutional principle embraced in Section 1, Article 3, is of far greater importance than all the revenue that could come from the statute, even if that Section could be regarded as one which could be bartered away for revenue only.

ARTICLE 3, SECTION 1, MUST CONTROL.

The decisions in *Brushaber v. Union Pacific R. R. Co.* and *Peck & Co. v. Lowe* seem to establish beyond all doubt the proposition that the question now under consideration cannot in any way be affected by the SIXTEENTH AMENDMENT. If this be correct, we repeat, the only matter to be determined is, Does Article 3, Section 1, properly construed forbid the imposition by Congress of income taxation on the compensation of the Judges in the absence of any other provision *expressly authorizing it*? The solution of that question depends upon whether that taxation di-

minishes the compensation, and we have endeavored to make it manifest that it does.

It is obvious, of course, that diminution was forbidden upon fundamental grounds. The power to impose Federal "taxation" (as distinguished from duties, imposts and excises) is not limited by any rule of uniformity. "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits." (*Weston v. Charleston*, 2 Peters, 466.) And certainly, as we have seen, such right involves the power to destroy that upon which the taxation is imposed—in this instance judicial compensation. The object of Section 1, Article 3 was to prevent any diminution of judicial independence or compensation by *any sort of Congressional action* which would tend to work either result. That objective was based upon the ideas, *first*, that its independence was an essential element of the efficiency of the judiciary, and, *second*, that it was otherwise possible in times of great turmoil or extraordinary excitement (which may not at any time be far off) for legislation to take hues therefrom, and there being no limits to the power (if it exist at all) to tax judicial compensation, legislation may go to any length.

If the power to "lay and collect taxes" is not hampered by the restriction provided by Article 3, Section 1, of the CONSTITUTION, and there being no pro-

vision forbidding classification nor any requiring uniformity, unbearable burdens might be imposed upon temporarily unpopular judges who might, in their circuits or districts, have gone counter to that excitement or its possibly destructive demands. It was to prevent such as well as other possibilities that Section 1 of Article 3 forbade the diminution of judicial compensation.

One question decided in *Pollock v. Farmers' Loan and Trust Co.* was that a tax on the income derived from rents on land was a direct tax on the land itself (just as the income tax here is directly upon judicial compensation), and in the course of the opinion illustrative propositions were stated by the court as follows (p. 581):

“If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions can not be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown v. Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as tax on imports and therefore void. And Chief Justice Marshall said: ‘It is impossible to conceal from ourselves, that this is varying the form, without varying the substance.

It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston v. Charleston*, 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible."

It would seem that the logic of these propositions would lead to the conclusion that the constitutional provision forbidding the diminution of judicial salaries cannot be evaded by formally calling the diminution "taxation," especially as the power to tax, if it exist at all, could as legally and constitutionally put on judicial compensation the somewhat ruinous rate (to say the least of it) of 99% as that of 6% fixed in the revenue Act of February 24, 1919. Would a tax of 99% put on that compensation as such diminish it in fact, even if not in form? If the 99% rate would be an invasion or a violation of the CONSTITUTION, so would be the 6% rate, the difference being only in the degree of diminution accomplished. One diminution, though more palpable, would not be more certain than the other.

Nor would it be more certain if the act, in express terms, lowered the salaries to be paid and called the process "taxation." The legislation involved in this

case, whether or not it was so intended, has, in fact, ignored Section 1 of Article 3 of the CONSTITUTION, or else has erroneously considered it as, in part, repealed by the 16TH AMENDMENT.

This situation may fairly be regarded as logically equivalent to an attempt by Congress to do indirectly what it could not do directly. That constitutional provision which forbids the diminution of judicial compensation can not, we submit, be evaded, disregarded or set at naught in that way, and the opinion of the Supreme Court in *Minnesota v. Barber*, 136 U. S. 316, though State legislation only was then directly involved, has greatly more than an incidental bearing on the questions now to be determined, and especially have those parts of it which we take from pages 319 and 320 of the report where Mr. Justice HARLAN, speaking for the court, said:

“The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declar-

ing the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court. In *Henderson &c v. New York &c.*, 92 U.S. 259, 268, where a Statute of New York imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the court said that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' In *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 63, where the question was as to the validity of a statute of the same State, which was attempted to be supported as an inspection law authorized by section 10 of article 1 of the Constitution, and was so designated in its title, it was said: 'A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title.' So, in *Soon Hing v. Crowley*, 113 U. S. 703, 710: 'The rule is general, with reference to the enactments of all legislative bodies, that the courts can not inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the facts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments.' In *Mugler v. Kansas*, 123 U. S. 623, 661,

the court, after observing that every possible presumption is to be indulged in favor of the validity of the statute, said that the judiciary must obey the Constitution rather than the law making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed."

These great principles of constitutional interpretation seem to be quite as impressive and controlling here as they were in the case then determined.

One of the fundamental bases upon which the security of our constitutional government rests is that there are three separate departments thereof, each indispensable to good government, namely, the Legislative, the Executive and the Judicial. The CONSTITUTION sought to make this proposition entirely clear, and no one nor any two of those departments is given power to destroy, to starve out, to paralyze or impair the efficiency of the third. This must of necessity be true. Within limitations fixed by the CONSTITUTION each of these departments, while it co-operates with the others for the public good, is nevertheless independent of them—each being supreme in its own sphere. The sphere of the Legislative department is wide, its potency immensely great. The sphere of the Executive department, always great, at times appears to be well nigh overwhelming. The not less indispensable sphere of the Judicial depart-

ment is much less conspicuous in its operations. It is made up of not over 170 individual judges—an average possibly of one person to every 650,000 of the population. The vigor and effective power of this numerically weak department of the government to perform the great functions for which it was designed, has been found, *first*, in the usually cordial co-operation with it of the other departments of the government, and, *second*, in the patriotic respect the people of our country have cherished for the organic law of the Nation.

Though certainly not so intended either by the Legislative department which enacted it or by the Executive department which approved it, the legislation now in question appears, nevertheless, to be an attack upon the Judicial department of the government, though that attack may be upon its mere outposts. Though not so intended, it might be given the appearance of a subtle design to affect the independence of a co-ordinate department of the government, and if not repulsed the attack might undermine or greatly impair the safeguards provided by Article 3, Section 1, of the CONSTITUTION.

When we recall and consider the history of the judiciary of the United States, can we believe the judicial department deserved the attack, if such it was? Fortunately there is a way to test whether the at-

tack was warranted, and we cannot doubt there will be a vindication of the CONSTITUTION whether our contentions in this case are upheld or overruled.

Each department of the government should respect its limitations, and not trench upon those of another. If any departure from this rule ever occurs it is rarely if ever otherwise than from misconception, and then it is the necessary duty of the courts to correct the error if appealed to. Many times, indeed in most instances, this duty is not an agreeable one. In the instance here involved it is claimed that Congress misconstrued the CONSTITUTION, and that despite its explicit provision to the contrary has diminished the compensation of the Judges, by a statute enacted while those Judges were in office, and by then imposing and collecting taxation on that *compensation received as such* for the taxable year in which it was paid.

In view of the great and cogent reasons already shown to have been the basis of the prohibition found in Article 3, Section 1 of the CONSTITUTION, if the disregard of that prohibitive clause is not questioned, it is possible (even if improbable) for others to follow, a taxation that would terrorize or destroy might be invented, and the undermining of the independence of the judiciary might begin. In view of this possi-

bility, resistance to this encroachment on the CONSTITUTION is not an unpatriotic service.

In short, the framers of the CONSTITUTION believed, first, that the judicial department of the government thereby created was equally as necessary as either of the other two—each of the three being indeed absolutely essential; second, that its independence of the other two should be guarded and especially protected because it was the weakest in number and power, and, therefore, third, it was safeguarded and protected in its independence by those provisions which make permanent the tenure in office of the judges and forbid any diminishing of their compensation during their continuance therein.

As has been abundantly shown, these were the reasons upon which the clause we are discussing was put into the organic law by the thoughtful men who constructed it. Clearly it was not constructed upon the petty thought that judicial salaries should merely escape taxation, but upon the far broader and more statesmanlike grounds urged in the *Federalist*, and afterwards approved by the public policy of most if not all of the States, as now manifestly shown in their own constitutions.

The 16TH AMENDMENT, as we have shown, was in no way designed to impair or to interfere with this fundamental purpose.

It was established at an early date that the salaries of officers of the United States could not be taxed by the States. (*Dobbins v. Commissioners*, 16 Pet. 435.) On the other hand, it was clearly settled in *The Collector v. Day*, 11 Wall. 113, 127, that the United States could not impose taxation upon the salaries of any of the judicial or other officers of the several States, and on page 127 of the report, it was said:

“But we are referred to the *Veazie Bank v. Fenno*, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch v. Maryland*, namely, ‘that the power of taxation involves the power to destroy.’ ” 8 Wall. 533.

The officers of all the States combined would probably exceed 60,000 in number—over 350 times as many as make up the entire body of the Federal Judiciary. The decision of the Supreme Court in *Collector v. Day* saved the rights of each and all of these State officers by the ruling that their compensation is entirely exempt from Federal taxation in any form. This exemption, though no provision in express terms mentions it, was established upon sound principles of constitutional interpretation, and Congress in no way attempted in the revenue Act approved February 24, 1919, to disregard that decision of the Supreme Court, though, in that Act, it is submitted, Congress did ignore the explicit prohibi-

tion of the higher authority, viz., Section 1 of Article 3 of the CONSTITUTION itself, when it diminished by income taxation the compensation of all those who make up the Federal Judiciary. The power to tax involving a power to destroy, as the Supreme Court has pointed out, that result is one which the CONSTITUTION intended to guard against in that limitation upon Congressional power.

But these more general observations apart, we come back to the contention that the laying of income taxation on the compensation of the Federal judges by the Act of February 24, 1919, though not so intended, is nevertheless an insidious encroachment upon their constitutional rights which might be made the beginning of an attack upon the independence of the judicial department of the government. Such "stealthy encroachments" (*Debbs* case, 158 U. S. 594) ought to be resisted, and upon the grounds hereinabove indicated that resistance should meet the approval of all thoughtful citizens, an unusual number of whom have recently taken the oath to support and defend that Constitution, one provision of which has been disregarded in the respect we have pointed out. Many of our citizens, indeed, at one time or another, have offered life itself in that behalf, and it can hardly be doubted that resistance to such encroachment is more patriotic than is sensitive ac-

quiescence. While acquiescence on some occasions might be harmless, in others it might leave an opening for great evils. The resister in this instance is not actuated by any sordid expectation of pecuniary advantage, as at his age of 77 he will probably be the loser in any event as expense accounts may show, but he will have vindicated his sense of devotion early acquired and firmly cherished to that CONSTITUTION he has long most unfeignedly revered and to maintain which in his early life he made the solemn vow to support and defend it.

We cannot doubt the importance of the constitutional question involved in plaintiff's claim. Would it not be wise and best to have an authoritative settlement of it? If so, this suit affords, for the first time, the opportunity for doing it.

It is submitted that the demurrer to the petition should be overruled and that plaintiff be adjudged the relief prayed for in the petition.

WALTER EVANS,
Pro se.

FRANK P. STRAUS,
HOWARD B. LEE,
WM. MARSHALL BULLITT,
EDMUND F. TRABUE,
Of Counsel.

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EX. D.C.
4/6/22



